No. 91-999

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GARMAN CONSTRUCTION COMPANY,

Petitioner,

v.

WILLIAM F. MARTIN, GEORGE F. HUTCHESON, RAY JOHNSON, as Trustees, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

When a prehire agreement arising under Section 8(f) of the LMRA has been found by the National Labor Relations Board to have been properly terminated under the Board's rules and this Court's decision in *McNeff v. Todd*, is a federal district court precluded under principles of *res judicata*, collateral estoppel or the Board's primary jurisdiction to consider unfair labor practices, from reviving the prehire contract and granting independent judgment to union trust funds under ERISA for contributions subsequent to the repudiation by the employer.

LIST OF PARTIES

Petitioner Garman Construction Company is a closely-held, non-public corporation owned by Harry Johnson. Garman has no parent companies, subsidiaries or affiliates.

The Respondents here include only the individual trustees of the following funds:

William F. Martin, Harry E. Baker, George F. Hutcheson, Ray Johnson, Theodore A. Criel, Victor Kirsch, Donald W. Dvorak and John E. Kenny of the Midwest Operating Engineers Welfare Fund;

William F. Martin, William S. Martin, Lester Doogan, Thomas Rodd, Theodore A. Criel, Robert Madden, Anglelo Di Paolo and LaVerne S. Brown of the Midwest Operating Engineers Pension Trust;

William F. Martin, Harry E. Baker, Lester Doogan, Thomas Rodd, Ken Doogan, Theodore A. Criel, LaVerne S. Brown, Victor Kirsch, Frank H. Thomas, Robert Madden, Ray Johnson and Carlo Santucci of the Operating Engineers Local 150 Apprenticeship Fund, and;

William F. Martin, William S. Martin, Lester Doogan, Thomas Rodd, Theodore A. Criel, Robert Madden, Angelo Di Paolo and LaVerne S. Brown of the I.U.O.E. Vacation Savings Plan.

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WILLIAM F. MARTIN, GEORGE F. HUTCHESON, RAY JOHNSON, as Trustees, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Garman Construction Company ("Garman") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 945 F.2d 1000 (7th Cir. 1991) and is reproduced in the appendix at page 1a.[1] The rulings of the United States District Court for the Northern District of Illinois are reprinted in the appendix at pages 15a, 18a, and 20a. The initial ruling is reported at 1989 U.S. Dist. LEXIS 7927 (N.D. Ill. 1989). The judgment is reprinted at 21a.

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[1] "_a" references are to the accompanying Appendix hereto.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1991. This Court has jurisdiction to review the judgment of that court under 28 U.S.C. §§ 1254(1).

STATUTES INVOLVED

The Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 151 *et seq.*, and the Employee Retirement Income Security Act of 1980 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, are involved in this case.

29 U.S.C. § 158(f) provides in pertinent part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement,...*Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

29 U.S.C. § 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

A. Factual Background

This case presents a question of significant statutory significance to employers nationwide: whether their voluntary prehire agreements properly found to be terminated by the National Labor Relations Board can continue to be enforced to compel contributions to trust funds by federal courts under ERISA.

Garman is a small commercial and residential contractor operating in Freeport, Illinois with approximately twenty employees at the time the lawsuit was filed. William F. Martin is President of International Union of Operating Engineers Local 150 ("Local 150") and is also a trust fund trustee.[2]

On October 6, 1982, Mr. Martin and the Funds' trustees (hereinafter "trust funds'), as beneficiaries under a prehire agreement signed by Garman and Local 150, filed the present case under LMRA § 301 and ERISA § 515 to recover allegedly delinquent trust fund contributions for the one worker employed by Garman within the jurisdiction of Local 150. Prehire agreements in one-person units represent a majority of Local 150's bargaining units and of its membership. NLRB Tr. Jerry Sheparson.

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[2]The offices of Local 150 and the Midwest Operating Engineers Fringe Benefit Funds are co-located, respectively, at 6200 and 6150 Joliet Road, Countryside, Illinois 60525. Exhibit P. "Exhibit" references are to the documents accompanying the Statement of Uncontested Facts filed in the district court.

On March 20, 1981, Garman signed a prehire agreement at the request of Local 150 on behalf of its one operating engineer. That agreement ran from July 1, 1978 to June 30, 1981, with an automatic roll-over clause, unless three months notice to terminate is given by either party.

On September 3, 1981, Garman sent written notice to Local 150 that "the memorandum agreement signed on March 20, 1981, is null and void as of the present date," because there was no union representation in an appropriate unit, no merger into a multi-employer unit, and no enforceable agreement under Board law. Exhibit B-1. A copy of the letter of September 3, 1981, was also sent to plaintiff "William F. Martin, Trustee for Fringe Benefit Funds." Exhibit B-1.

On the same day, September 3, 1989, Garman also sent an independent letter to Mr. William F. Martin and Trustees of the Midwest Operating Engineers Pension Trust, Midwest Operating Engineers Welfare Fund, Local 150 Apprenticeship Fund, and Local 150 Vacation and Savings Plan, specifically notifying them that Garman "no longer had a bargaining relationship with Local 150 and Garman's obligation to the Funds were equally extinguished." Exhibit B-2.[3]

On September 9, 1981, Garman filed five representation petitions with Region 33 of the National Labor Relations Board seeking to obtain resolution of the majority status of the unions it had been associated with, including Local 150 (33-RM-202). Exhibit T.

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[3]Garman took these actions to comply with the law of voluntary 8(f) prehire agreements as was understood at the time in *NLRB v. Local Union No. 103, Ironworkers* (*Higdon Construction Co.*), 434 U.S. 335, 345 (1978). It provided explicit notice of termination to Local 150, made contributions to the trust fund up to the day of repudiation, and filed several representation petitions with the Board to allow its employees to select a majority representative in an overall unit or in the single-man unit, as the Board would find appropriate.

b. Prior NLRB Proceedings Finding No Unfair Labor Practice

On September 28, 1981, Mr. Bernard M. Baum, attorney for Local 150, of the law firm Baum, Sigman and Gold, Ltd., responded to Garman's letter of September 3, 1981, arguing that the Memorandum of Agreement dated March 20, 1981, "cannot be considered a 'pre-hire agreement'" as the union represented the sole operating engineer Garman employed.

> Accordingly, based on the above, you are advised that the Local 150 will continue to take appropriate legal steps to enforce its valid collective bargaining agreement with Garman Construction Co. and that *the Trustees will take appropriate action* to enforce the written obligation of your client to make fringe benefit contributions as provided in the applicable collective bargaining agreement.

Exhibit S (emphasis added).

On October 2, 1981, Local 150 filed an unfair labor practice charge with Region 33 of the National Labor Relations Board alleging that Garman had "refused to recognize and bargain" with Local 150 "in a multi-employer bargaining unit" since September 3, 1981, in violation of section 8(a)(1) and (5) of the National Labor Relations Act. Exhibit C. The charge was filed by Local 150's attorney Mr. Louis Sigman of the law firm Baum and Sigman.

A hearing was first scheduled by Region 33 of the Board on the representation petitions filed by Garman. Garman submitted a Motion to Join Necessary Parties, which included Mr. William F. Martin and/or Trustees of the Midwest Operating Engineers Pension Trust, Midwest Operating Engineers Welfare Fund, Local 150 Apprenticeship Fund, and Local 150 Vacation and Savings Plan. Exhibit U. The Motion argued that the funds were necessary parties because 1) they were no longer receiving

contributions, 2) the funds were represented in a federal lawsuit by the same attorneys appearing for Local 150 before the Board, and 3) the law permits an employer to void a pre-hire agreement so long as a union does not represent a certified majority of employees. A copy of the Motion was sent to the Local 150 trust funds. The motion was denied.

On February 19, 1982, Region 33 of the Board issued an unfair labor practice complaint against Garman alleging 1) that Local 150 was the exclusive bargaining representative of Garman's employees "by virtue of Section 9(a) of the Act," Exhibit X at 4 ¶ 7(e), and 2) Garman had illegally repudiated and refused to bargain with Local 150, *id.* at 7 ¶ 11(a) & (b). The matter proceeded to a hearing before an administrative law judge ("ALJ").

On March 30, 1982, the Regional Director of the Board dismissed the representation petitions, "subject to reconsideration," due to the unfair labor practice complaint that had been filed against Garman by Local 150 and other unions. Exhibit W at 7.

At the hearing before the ALJ, the Board's General Counsel argued that the remedy for Garman's repudiation of the Memorandum of Agreement and failure to follow the union master contract from September 3, 1981 forward, should be to:

> apply the contract that should have been applied and make whole the employees for it's repudiation of the contract [and] *make whole for payment to the trust funds any payments that should have been made*, that they continue to abide by and apply the terms of that contract.

Exhibit l at 20, lines 15-20 (emphasis added).

The General Counsel's actual Proposed Order for the ALJ provided, Exhibit F at 66:

> (g) Pay into the various Operating Engineers Local 150, Carpenters' and Laborers' funds, including working assessments to the Carpenters and working dues to the Laborers, the contributions and payments it has failed to make since September 1, 1981, with respect to all employees since September 1, 1981, who were working or who should have been working as set forth in the "Remedy" section herein.

On September 29, 1983, the ALJ issued a decision holding that Garman had not violated sections 8(a)(1) and (5) of the National Labor Relations Act when it repudiated the Memorandum of Agreement since "the Operating Engineers do not enjoy majority status in an appropriate unit of Respondent's [Garman's] employees. 34a.

Since Local 150 had fully participated in the proceedings before the Board's ALJ, it had standing to file exceptions to the ALJ's decision with the Board in Washington, D.C. It did. Exhibit M2 at 40.

The General Counsel of the Board also filed exceptions to the ALJ's decision for her "failure to find and conclude that Respondent [Garman] violated Sections 8(a)(1) and (5) as alleged in the complaint as amended regarding the Operating Engineers Local 150, and to the concomitant failure to recommend an appropriate remedy for such violations," Exhibit R1 at 3, in that Garman had failed to make,

> contractually-entitled benefits since on or about September 3, 1981 and by withdrawing recognition from and refusing to bargain with the Operating Engineers since on or about September 3, 1981. The Board is therefore requested to overrule the Administrative Law Judge's contrary findings and conclusions ...to order appropriate remedies for these violations including an order that Respondent (1) recognize and, upon request, bargain

> collectively with Operating Engineers Local 150 in the appropriate multi-employer bargaining unit; (2) reinstate and give full force and effect to the 1981 to 1984 Operating Engineers Local 150 collective bargaining agreement; (3) *pay the Operating Engineers Local 150 trust funds all contributions and payments it has failed to make since September 1, 1981*,...; (4) make whole, with interest, employees...by reason of...not making payments to the aforesaid union's funds, including such losses suffered by employees who would have been working but for the unilateral changes.

Exhibit R2 at 17 (emphasis added).

On December 14, 1987, the Board issued its Decision and Order. 22a. The Board applied its recent decision in *John Deklewa & Sons*, 282 N.L.R.B. No. 184 (1987), *aff'd sub nom., International Ass'n of Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988) ("*Deklewa*"),[4] to the case and ruled that Garman's employee unit had not merged into the multiemployer unit and reaffirmed that an employer is free under Board law to repudiate prehire contracts in one-man units. App. at 5. Thus, "[a]pplying *Deklewa* to the instant case we conclude that the Respondent [Garman] did not violate Section 8(a)(5) and(1) of the Act with respect to the International Union of Operating Engineers, Local 150...." 25a.

On January 18, 1988, Local 150 filed a Petition for Cross-Review of the Board's Decision and Order in the Seventh Circuit, as did Petitioner Garman, Operating Engineers, Local 150 v.

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[4]In *Deklewa*, the Board determined that it would no longer allow unilateral repudiation of prehire agreements, but would allow an employer to file a representation petition at any time to test the majority status of a union. *Deklewa*, 282 N.L.R.B. 1375, 1385 & n.42. "A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship....Failure to terminate the 8(f) relationship or its premature reestablishment after an election will subject the parties to 8(a)(2) and 8(b)(1)(A) liability." *Id.*

NLRB, Case No. 88-1005, seeking reversal of the Board's Order: "dismissing portions of the Complaint issued in Case No. 33-CA-5673, alleging the violation by Garman Construction Company of Sections 8(a)(1) and (5) of the National Labor Relations Act." Exhibit CC-6.

On April 1, 1988, the Seventh Circuit dismissed the petitions for review of the Board's Decision and Order upon consideration of a Joint Motion to Dismiss filed by Garman, the Board, and Local 150. 104a.

c. The Trust Fund Litigation

On October 6, 1982, William F. Martin, President-Business Manager of Local 150, as a trustee of the Operating Engineers trust funds, filed the instant suit alleging jurisdiction under LMRA § 301, 29 U.S.C. § 185, and ERISA, against Garman for the non-payment of contributions since September 3, 1981. Exhibit FF. Paragraph 2 of the complaint alleged that "[t]he said Funds have been established pursuant to a collective bargaining agreement heretofore entered into between the INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150 and certain Employer Associations...." The Respondent Funds alleged Garman "agreed to be bound by the collective bargaining agreement or agreements hereto attached and made a part hereof, whereunder Defendant is required to make contributions to such Funds, as therein required." Exhibit FF ¶ 4. The attorneys for the trust funds' litigation are Bernard M. Baum and Louis E. Sigman.

Garman filed its Answer and Affirmative Defenses on November 16, 1982 referencing in defense the issues set to be decided in the Board proceeding. Exhibit J. The trust funds' litigation was stayed by the district court pending the Board's decision.

On June 23, 1989, subsequent to the conclusion of the Board action and dismissal of the enforcement litigation in the Seventh

Circuit, the district court reinstated the case at the request of the trust funds. 15a.

On April 11, 1990, the district court granted summary judgment to the trust funds finding that Garman could not repudiate the prehire agreement with Local 150 pursuant to the Board's rules under *Deklewa*. 18a. That is, it chose to apply *Deklewa* inconsistently with the interpretation of *Deklewa* that the Board applied in its decision against Garman, by accepting the Board's finding of a contract, but rejecting its conclusion that the prehire agreement had been repudiated.

On April 27, 1990, the district court denied Garman's Motion for Reconsideration, 20a, again declaring that "[n]ot applying *Deklewa* would be contrary to ERISA and to the policy considerations underlying ERISA," and entered judgment against Garman for the balance of unpaid contributions, liquidated damages, and audit fees. 21a.

d. The Court of Appeals Decision

Garman filed a timely appeal of the district court's final order under Fed. R. App. P. 4(a)(4). The Seventh Circuit stated the issue to be "the preclusive effect of a decision by the National Labor Relations Board on a subsequent district court action under the Employee Retirement Income Security Act of 1974." 1a. The appellate court ultimately came to the same conclusion as the district court, but did so based upon its own circuit progeny barring all employer defenses in trust fund litigation lawsuits.

Hence, the court of appeals recognized that in the circumstance of Garman's one-man unit, Garman was entitled under Board caselaw to repudiate the prehire agreement with Local 150 and that Local 150 had petitioned for review of the Board's decision, but jurisdiction to review that case was lost due to the joint motion to dismiss. 5a, 14a. The Seventh Circuit rejected Garman's argument that application of *res judicata*,

collateral estoppel, and primary jurisdiction of the Board in labor law matters required deferral to the Board's ruling.

Res judicata was refused by the appellate court by distinguishing this Court's jurisprudence, *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). There, this Court ruled that agency adjudications of a factual finding can be a bar to retrial of the same matter in later proceedings, 8a. The Seventh Circuit determined that because the Board had no jurisdiction under ERISA, the Board's determination that Garman lawfully terminated the prehire contract was not entitled to comity. 8a. The appellate court declined to apply collateral estoppel, because under *Central States, Southeast and Southwest Pension Fund v. Gerber*, 870 F.2d 1148, 1149 (7th Cir. 1989), that circuit court has refused to apply any and all employer contract defenses against trust funds, although it was cognizant of *the Court's decision in McNeff v. Todd*, 461 U.S. 260 (1983), that prehire agreements may be repudiated under labor law, but "the Court did not address possible enforcement under ERISA." 11a.

Finally, the Seventh Circuit concluded that a policy choice made by this Court in *Laborers Health & Welfare Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), where the existence of an enforceable duty to bargain arises under the LMRA so that the courts must defer to the Board, was inapplicable "even if repudiation is an unfair labor practice" because the Board had in fact found a contract existed, although a necessary finding to deciding that the contract was properly breached. 13a. Therefore, although the trust funds' claim against Garman was an arguable unfair labor practice, "[b]ecause the Board lacked jurisdiction to consider the ERISA claim, it does not enjoy primary jurisdiction as to this issue....and the principles of contract interpretation and federal law at stake do not require initial adjudication by the Board." 13a.

The Seventh Circuit granted a Stay of the mandate pending the filing of this Petition.

REASONS FOR GRANTING THE WRIT

I.

THE SEVENTH CIRCUIT'S REFUSAL TO APPLY THIS COURT'S CLEAR INSTRUCTIONS IN *ADVANCED LIGHT-WEIGHT CONCRETE* CONFERRING PRIMARY JURISDICTION TO THE BOARD WHEN ERISA OBLIGATIONS TURN UPON BOARD RULINGS UNDER THE LMRA IS OF PROFOUND IMPORTANCE TO EMPLOYERS NATIONWIDE AND CONTRARY TO DECISIONS IN FIVE CIRCUITS

The Seventh Circuit's reading of *Advanced Lightweight Concrete*, 484 U.S. 539, 103 S. Ct. 830 (1988), confirms a fundamental disagreement with this Court in this Court's refusal to permit ERISA jurisdiction to result in inconsistent employer obligations under the LMRA. The Seventh Circuit's refusal has resulted in the inconsistent application of fundamental labor law principles with profound inconsistent results: Garman must now pay trust fund contributions on behalf of workers who the Board has found are no longer covered by an enforceable union contract!

The Seventh Circuit's conclusion is directly contrary to *Operating Engineers Pension Trust v. Beck Engr'g & Surveying Co.*, 746 F.2d 557 (9th Cir. 1984) (trust fund cannot enforce repudiated prehire agreement in one-man unit), *Local 92, Ironworkers v. B & B Steel Erectors, Inc.*, 850 F.2d 1551 (11th Cir. 1988) (employer's repudiation of prehire agreement bars trust fund litigation), *Contractors Southern Cal. Admin. Corp. v. J.L.M. Constr. Co.*, 809 F.2d 584, 598 (9th Cir. 1987) (same), *Contractors, Laborers, Teamsters & Engrs. Health & Welfare Fund v. Harkins Constr. & Equip. Co.*, 733 F.2d 1321, 1326 (8th Cir. 1984), *Washington Area Carpenters' Welfare Fund v. Overhead Door*, 681 F.2d 1, 9 (D.C. Cir. 1982) (same), and *NLRB v.*

Donna-Lee Sportswear, 836 F.2d 31 (1st Cir. 1987) (applying collateral estoppel to a Board legal conclusion contrary to a factual finding made under ERISA). The record in this case provides a proper vehicle for this Court to reestablish a uniform approach to primary jurisdiction in the Board whenever ERISA jurisdiction requires the consideration of bargaining obligations under NLRB caselaw. The record demonstrates the importance of this case to construction unions and employers, where one-man units comprise a majority of the workers in non-urban areas.

Both the burden upon small employers, unions and workers defending their actions in multiple fora and the risk of inconsistent decisionmaking has been this Court's foundation for the preemption of all activity that is "arguably subject to § 7 or § 8 of the Act, [then] the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). That policy, the appellate court concluded was inapplicable on its face, rather than recognizing that careful consideration for Congress' twin statutes should require deferral, especially when the Board has the power to grant the identical relief possible under ERISA, albeit as a remedy under the LMRA rather than directly under ERISA.

A. REPUDIATION OF PREHIRE CONTRACTS UNDER THE LABOR LAW TERMINATES POST-REPUDIATION LIABILITY TO UNION TRUST FUNDS UNDER ERISA

In *Advanced Lightweight Concrete*, this Court concluded that an employer's "obligation to contribute" to a plan within the language of ERISA (*see* § 515, 29 U.S.C. § 1145: "obligated to make contributions"), was crafted by Congress in recognition "of the two different sources of an employer's duty to contribute to covered plans." 103 S. Ct. at 834. However, the central question confronted in that case was whether the employer had a post contract obligation to make the trust fund payments:

> Thus, both the text and the legislative history of §§ 515 and 502(g) provide firm support for

> the Court of Appeals' conclusion that this remedy is limited to the collection of "promised contributions" and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make postcontract contributions constitutes a violation of the NLRA.

103 S. Ct. at 835-36.

In the context of Petitioner's case, whether Garman could lawfully repudiate its prehire agreement and whether it was in fact *terminated* at the time the trust funds sued is a question requiring more than just a simple reference to contested facts, since Congress specifically preserved to employers the opportunity to terminate prehire agreements in the construction industry and the Board has held that prehire agreements do not automatically roll-over even if timely notice to terminate is not given.[5]

As this Court concluded in *NLRB v. Local Union No. 103, Ironworkers* (*Higdon Construction Co.*), 434 U.S. 335, 345 (1978), Section 8 of the NLRA makes it an unfair labor practice to bargain with a minority or uncertified labor organization except in the construction industry. *See* 3a n.3.[6] Consequently, "[t]he employer's duty to bargain and honor the prehire contract is ultimately contingent on the union's attaining majority support at the various construction sites." *Id.* "Until that time the prehire agreement is *voidable* and does not have the same stature as a collective-bargaining contract entered into with a union actually

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[5]*See Deklewa*, 282 N.L.R.B. at 1386 ("Even absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship.").

[6]"There could be no clearer abridgement of § 7 of the Act" than to select a union from "a minority of employees, thereby impressing that agent upon the nonconsenting minority." *ILGWU v. NLRB*, 366 U.S. 731, 737-38 (1961).

representing a majority of the employees and recognized as such by the employer." *Id.* at 341.

Precisely what financial obligation an employer had until repudiation was decided by the Court in *McNeff v. Todd*, 461 U.S. 260 (1983). There, the Court reaffirmed the "fidelity to Congress' intent that prehire agreements be voluntary-and voidable" in a lawsuit filed against the repudiating employer by *union trust funds*. There, however, McNeff asserted no behavior to repudiate the prehire agreement by "sending notice to the union, engaging in activity overtly and completely inconsistent with contractual obligations, or, as respondents suggest, precipitating a representation election pursuant to the final proviso in § 8(f) that shows the union does not enjoy majority support." 461 U.S. at 270 n.11. Because of McNeff's failure to take "appropriate action" the prehire contract's accrued contributions were held enforceable against the employer prior to repudiation. *Id.* at 271-72.

What Congress specifically provided to employers in Section 8(f), the Seventh Circuit under ERISA is not empowered to take away. As the Court warned in *Higdon Construction*, 434 U.S. at 351, "[t]hat a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable." In that case the Court held that the union's majority status "is subject to litigation in a § 301 lawsuit to enforce a § 8(f) contract." *Id.* at 352.

Here, the Seventh Circuit has held that all defects in the formation of a contract are completely unavailable in a § 301 and ERISA lawsuit "such as fraud in the inducement, oral promises to disregard the text, or the *lack of majority support for the union and the consequent ineffectiveness of the pact under labor law*-it must still keep its promise to the pension plans." 9a, *quoting*

Gerber, at 1154.[7] It decided that "[f]ederal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law - other than 29 U.S.C. 186." *Id.* at 1153.[8]

Yet, under *Higdon Construction* and *McNeff v. Todd*, Petitioner should have had the right to interpose its Board victory before the federal court on the same set of facts. Only if *Higdon* and *Deklewa* are read out of existence to create employer liability both prospectively and retroactively to the employer's repudiation is the Seventh Circuit correct.[9]

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[7]The genesis of the Seventh Circuit's *Gerber* conclusion that all contract defenses are unallowable derives from the approval of *Lewis v. Benedict Coal*, 361 U.S. 459 (1960), in the legislative history of ERISA. However, in *Benedict Coal*, this Court established no blanket exception barring the assertion of *any* contractual defenses against pension trustees. Rather, "[t]he rights of the trustees...are entirely derivative....,but the fact that the suit is brought for the benefit of the third party beneficiaries *would not foreclose a defense that there was no contract....*" *Id.* at 199 (emphasis added). The purpose of the *Benedict Coal* exception was to *protect* trustees from the consequences of union misdeeds, not to shield these funds from all defenses applicable to its primary union.

[8]Other Circuit's generally agreeing with the thrust of the *Gerber* opinion have not gone so far as the Seventh Circuit suggests. In *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2d Cir. 1990), the court rejected an employer's defense to a trust fund collection suit by raising the defense of lack of majority status, not that the contract had been properly repudiated as had Garman. *Also Berry v. Garza*, 919 F.2d 87 (8th Cir. 1990).

[9]Enforcement of the Board's new *Deklewa* ruling has not been uniformly enforced retroactively by the circuit court's on fairness grounds. Not retroactive: *C.E.K. Ind. Mech. Contractors, Inc. v. NLRB*, 921 F.2d 350 (1st Cir. 1990); *United Bhd. of Carpenters, Local 953 v. Mar-Len of Louisiana*, 124 L.R.R.M. (BNA) 1185 (5th Cir. 1990); *Fox Painting Co. v. NLRB*, 135 L.R.R.M. (BNA) 3009 (6th Cir. 1990); *Mesa Verde Constr. Co. v. Northern Calif. Dist. Council of Carpenters*, 895 F.2d 516 (9th Cir. 1989); NLRB v. W.J. Miller Co., 871 F.2d 745 (8th Cir. 1989) (retroactive unless manifestly unjust). Retroactive: *NLRB v. Bufco Corp.*, 899 F.2d 608 (7th Cir. 1990). Either way, it has no application to

The District of Columbia Circuit has explicitly rejected this interpretation because it would "contravene the principle that adherence to them be *voluntary*." *Washington Area Carpenters' Welfare Fund v. Overhead Door*, 681 F.2d 1, 9 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 926 (1983) (rejecting post-repudiation 8(f) liability to pension funds) (emphasis in original). This rule has been followed in the Eighth, Ninth and Eleventh Circuits in *Local 92, Ironworkers v. B & B Steel Erectors, Inc.*, 850 F.2d 1551 (11th Cir. 1988), *Contractors Southern Cal. Admin. Corp. v. J.L.M. Constr. Co.*, 809 F.2d 584, 598 (9th Cir. 1987), *Contractors, Laborers, Teamsters & Engrs. Health & Welfare Fund v. Harkins Constr. & Equip. Co.*, 733 F.2d 1321, 1326 (8th Cir. 1984). The circuit conflict with the Seventh Circuit is evident.

Furthermore, nothing in ERISA compels the Seventh Circuit's result since the "specific purpose" of § 515 was only to add the remedies of interest, liquidated damages, costs, and attorneys' fees "previously unavailable under § 301 of the LMRA," to encourage compliance. *Advanced Lightweight Concrete*, 108 S. Ct. at 836 n.16.[10] "Unilateral changes in the terms and conditions of employment are prohibited, not to vindicate the interests that motivated the enactment of § 515 in 1980, but rather to carry out the purposes of the NLRA." *Id.*

In *Operating Engr. Pension Trust v. Beck Engr'g & Surveying Co.*, *supra*, the Ninth Circuit came to a diametrically opposed conclusion in an identical trust fund suit filed under LMRA § 301 and ERISA § 515 to compel contributions from an employer in a single-person unit subsequent to repudiation. Contrary to the

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Garman as the Board ruled.

[10]The Court also concluded in *Advanced Lightweight Concrete* that the imposition of "[o]ther employer defenses that raise complex factual and legal questions may also be asserted" in Board cases requiring whether employer liability exists when the trust fund files its charge, thereby envisioning the employer's opportunity to assert defenses may be validly posted against the trust fund. *Id.* at 837 n.18.

Seventh Circuit's ruling against Petitioner Garman, the Ninth Circuit concluded that under *McNeff* and *Higdon*, an employer is entitled to make affirmative repudiation of a prehire agreement in single employee units. 746 F.2d at 566. The court based that conclusion upon the "long-standing policy, [that] the NLRB will not certify or find appropriate a single-person bargaining unit in a representational proceeding. This is not merely a matter of the Board's discretionary jurisdiction. Rather, it is a *rule which is inherent in the structure and purpose of the Act.*" *Id.* at 565 (emphasis added).[11]

Since, no prehire contract exists under these authorities subsequent to the Board's finding a lawful repudiation, to compel contribution payments "beyond the termination date of the applicable collective agreement" to the trust funds must be to engage in activity in violation of LMRA § 302(c)(4), 29 U.S.C. § 186(c)(4). As this Court affirmed in *Kaiser Steel v. Mullins*, 455 U.S. 72, 77 (1982), "illegal promises will not be enforced in cases controlled by the federal law."

In *Kaiser*, the Court ruled that ERISA cannot itself compel "the promise to contribute" when it may be illegal under the Sherman Act or the NLRA." *Id.* at 79. Kaiser Steel sought to raise the illegality of royalty payments to the union trust funds in its affirmative defense, but was rebuffed by the District of Columbia Circuit. This Court reversed, ruling that courts cannot enforce illegal contracts and "pension fund trustees have no special status which exempts them from the general rule that courts do not enforce illegal contracts. Only Congress could create such an exemption and...it has not done so." *Id.* at 83 n.8. Thus, where the defense is not directed to a collateral matter, but

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[11]The Ninth Circuit has taken explicit exception to the Seventh Circuit's conclusion that the lack of majority support can never be raised in ERISA cases. Because "it would be futile for the employer of a single employee to petition the Board for a representation election, *Beck*, 746 F.2d at 565, the employer "has no standing to bring its case before the NLRB," therefore these defenses can be raised in the ERISA case. *Id.* at 566.

to the portion of the contract for which enforcement is sought, a court must entertain the defense." *Id.* at 86. The Court needs to clarify this matter now.

The predicament that Petitioner Garman faces is precisely the fear of contradictory litigation necessitating the primary jurisdiction of the Board as announced in *Advanced Lightweight Concrete*:

> [W]hether an employer's unilateral decision to discontinue contributions to a pension plan constitutes a violation of the statutory duty to bargain in good faith is the kind of question resolved by the administrative agency with expertise in labor law. There are situations in which district judges must occasionally resolve labor issues, but they surely represent the exception rather than the rule. In cases like this, which involve either an actual or an "arguable" violation of § 8 of the NLRA, federal courts typically defer to the judgment of the NLRB.

108 S. Ct. at 837.

In these circumstances, just as in the impasse bargaining principles considered by the Court in *Advanced Lightweight Concrete*, Congress has provided trust funds a remedy through the Board for enforcement of any ERISA obligations. That ERISA obligation plainly arises under the LMRA, is enforceable only to the extent not in violation of § 302, and involves principles readily applied by the Board in every case:

> The net effect of the labor law duties imposed on employers by that legislation provides a substantial benefit to ERISA plan trustees, but Congress *has not provided them with a unique and preferred procedure for obtaining redress for*

> *an employer's violation of its duty to bargaining with the union.*

108 S. Ct. at 838 (emphasis added).[12]

B. LITIGATION UNDER ERISA IS SUBORDINATE TO NLRB RULINGS OF LAW

In fact, Section 514(d) of ERISA, 29 U.S.C. § 1144(d) (emphasis added), specifically proscribes "inconsistencies" with other federal laws and prioritizes ERISA litigation to be subordinate:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c) of this title) *or any rule or regulation issued under any such law.*

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[12]The Board has repeatedly used its power to fashion appropriate remedies where it found that unilateral changes, including the cessation of fringe benefit or pension fund contributions, were made in violation of Section 8(a)(5). For example, in *Stone Boat Yard and United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO*, 264 N.L.R.B. 981 (1983) *enf'd sub nom. Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. den.*, 446 U.S. 937 (1984), which was decided well after Sections 515 and 502 were added to ERISA, the Board concluded that the employer committed an unfair labor practice under Section 8(a)(5) by stopping payments to union fringe benefit and pension plans following the expiration of a collective bargaining agreement. The Board ordered the employer to resume making contributions, to pay contributions owed from the time the collective bargaining agreement expired, and to make employees whole, including interest for any losses or expenses they incurred due to the employer's cessation of payments to the plans.

Cases like *Stone Boat Yard* make it clear that the NLRB can and, in appropriate circumstances, will award relief like that available under Section 502(g)(2). *See e.g. G.T. Knight Company, Inc.*, 268 N.L.R.B. 468, 469-70 (1984); *Samuel Kosoff & Sons, Inc.*, 269 N.L.R.B. 424, 430-31 (1984); *Advanced Installations, Inc.*, 268 N.L.R.B. 640, 641 n.11 (1984). Thus, the trust funds here cannot claim that the Board cannot provide them with an adequate remedy.

In conjunction with the specific limitation in ERISA that the employer's duty to make contributions exists "to the extent not inconsistent with law," Section 515, 29 U.S.C. § 1145, ERISA itself contemplates that its obligations exist only to the extent they may exist or are "impaired by other rules, such as Board decisions. Since Petitioner Garman's prehire agreement had terminated it had no further obligation to contribute.

Consequently, once the Board "ruled" under the labor law that the agreement with Local 150 could be repudiated by Garman, that fundamental ruling should bind the district court under the terms of ERISA that ERISA obligations could not be otherwise constructed to "invalidate" or "impair" rules made under other federal statutes. Certainly, the labor law is the guiding statute under ERISA, for many obligations arise under collectively bargained agreements administered and enforced by the National Labor Relations Board, the expert agency established to handle these issues. "In no way can the [fund's] suit force continuation of a section 8(f) relationship, nor can it impair employer or employee free choice." *Overhead Door*, 681 F.2d at 10. "This reads *Iron Workers [Higdon]* narrowly as being limited to unfair labor practice cases, a reading with which we disagree.". *Id.*

Congress did not intend to repeal labor law privileges and defenses by its enactment of ERISA, *Kaiser Steel Corp. Mullins*, 455 U.S. 72, 88 (1982), or that ERISA should supersede the labor law. *Id.* at 88 n.13.[13] When the Board has allowed the termination of Garman's prehire agreement for the purpose of

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[13]The Court also suggested in this footnote in *Kaiser Steel* that there were limits to the quest for payments by trust funds, such as where the benefit sought was illegal under the NLRA: "We are unpersuaded that Congress intended to give pension fund trustees the benefit of illegal bargains that were not, and should not have been, relied upon to ensure the solvency of the trust funds." In the context of the case at bar, the trust funds are seeking a contractual benefit under the labor law which had been denied by the Board; in *Kaiser*, the trust funds sought payments under an agreement illegal under § 8(e).

recognition, wages and pensions, then it must be "terminated" for all purposes. If what the trust funds and the Seventh Circuit allege is true, then federal labor law policy is skirted to a degree not contemplated by the Court's ruling in *Advanced Lightweight Concrete*. The relegation of that case to its unique facts by the Seventh Circuit, no longer requires that the Board be permitted the opportunity to first decide the question of enforceability so as to avoid a conflict in the interpretation of the mechanism under which bargaining obligations arise with the federal courts.

Moreover, the Seventh Circuit's interpretation only encourages multiple litigation and has a grave negative impact on fundamental labor relations policy in the construction industry, highly regulated by the Board under Section 8(f) exception, that ERISA was not intended to have.

II.

PENSION TRUSTEES SHOULD BE PRECLUDED FROM RELITIGATING ISSUES OF LAW FOUND ADVERSE TO THEIR PRIVIES BY THE NLRB

The Respondent trustees were fully on notice of this proceeding before the NLRB both by actual notice and by virtue of being represented by the same counsel. Consistent with the Court's decision in *Allen v. McCurry*, 449 U.S. 90 (1980), *Donna-Lee Sportswear*, 836 F.2d at 38, and the decision in *Rider v. Pennsylvania*, 850 F.2d 982 (3d Cir. 1988), the interests of the funds were fully represented and the identical question whether or not Garman had an obligation to make payment to the Funds after September 3, 1981 was determined by the Board.

Pension funds have been generally insulated from defenses because they are in a position of unknowing third parties. However, this rationale is inapplicable where the fund has direct knowledge of the underlying facts. *See Operating Engrs. Pension Trust v. Cecil Backhoe Svcs., Inc.*, 745 F.2d 1501, 1507 (9th Cir.

1986). The trustees, should be collaterally estopped by the decision of the Board involving their signatories.

> If it means nothing else, section 515 means that, at least when the Trustees are not implicated in the alleged misconduct, their suit cannot be thwarted by defenses not apparent from the face of the agreement.

Bituminous Coal Operators Ass'n v. Connors, 867 F.2d 625, 634 (D.C. Cir. 1989).

The Seventh Circuit concluded that issue preclusion was unavailable to Garman as the NLRB lacked jurisdiction of the claim under ERISA. 7a. It noted the district court "afforded collateral estoppel effect to the Board's ruling on the existence of the contract," 8a, but the appellate court concluded collateral estoppel "does not automatically preclude an ERISA remedy when the company avoids liability for an unfair labor practice under the NLRA." 10a. This conclusion is contrary to precedents in other circuits and is inconsistent with the Restatement (Second) of Judgments § 27:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

The Seventh Circuit applied the issue of fact decided by the Board, but not the issue of law. As the First Circuit found in *Donna-Lee Sportswear*, even the Board is precluded from finding as an unfair labor practice a fact found adversely by a federal court in a trust fund suit. *Id.* at 35. *Also NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). The privity that is required for preclusion is whether the relationship between two parties is sufficiently close in litigation at which at least one party was present. *Id.*

Similarly, the critical issue here is whether ERISA provides a separate and independent vehicle for liability by union officials wearing their trust fund hats when an employer's action is arguably a violation of the duty to bargain, and in the circumstances of the instant matter, when the employer's action has not been found to be in violation of the duty to bargain. These are important questions that require this Court's serious attention.

Accordingly, this case is in the very posture of a suit which the Court envisioned should have occurred. Go to the Board to seek the remedy for delinquent trust fund contributions, not the federal courts. But, because the "trust fund" via its primary benefactor lost there, the trust fund is not entitled to a second bite at the apple by seeking jurisdiction in the federal court. *Allen v. McCurry*, 449 U.S. at 94 ("a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."). For it is precisely the possibility of conflicting rulings and remedies in a federal district court that *Advanced Lightweight Concrete* would prevent, if the contract was ruled unenforceable by the Board on the merits. No purpose is served by permitting district judges to find a remedy the Board discarded.

CONCLUSION

This case presents the important issue of primary jurisdiction raised in thousands of construction industry cases every year being considered by the Board and the issue left open in *Advanced Lightweight Concrete Co.* Plenary review of these issues is necessary to correct the multi-circuit conflict in the statutory design under the federal labor statute and ERISA as *Advanced Lightweight* contemplated and the nature of the procedural defenses that are available in the administration of the statute.

For these reasons, Petitioner respectfully requests that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: December 20, 1991

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WILLIAM F. MARTIN, GEORGE F. HUTCHESON, RAY JOHNSON, et al.,

Plaintiffs-Appellees,

v.

GARMAN CONSTRUCTION COMPANY,
a corporation,

Defendant-Appellant.

No. 90-2177

February 12, 1991, Argued - October 17, 1991, Decided

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 6140; Ann Claire Williams, Judge.

JUDGES: Cudahy and Ripple, Circuit Judges, and Eschbach, Senior Circuit Judge.

CUDAHY, *Circuit Judge*. This case asks us to determine the preclusive effect of a decision by the National Labor Relations Board (Board or NLRB) on a subsequent district court action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132, 1145 (1983) (ERISA). We conclude that on the facts of this case, the Board's decision that the employer had not committed an unfair labor practice does not preclude the district court from later finding that the employer faced liability under ERISA.

I.

In March 1981 Garman Construction Company (Garman), a small general contractor, and Local 150, International Union of Operating Engineers (Union or Local 150), signed a "Memorandum of Agreement" (Agreement),[1] governing fringe benefit

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[1]The agreement reads in part:

1. The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION.

2. The Parties agree that the EMPLOYER is part of a single bargaining unit made up of all employers party to the Master Agreement adopted herein.

3. The Parties do hereby adopt the Master Agreement dated July 1, 1978, entered into by and between the UNION and the MID AMERICA REGIONAL BARGAINING ASSOCIATION (ILLINOIS BUILDING AGREEMENT) and the parties do hereby mutually agree to be bound by the terms and conditions of that Master Agreement and the Agreement and Declaration of Trust of the Midwest Operating Engineers Pension Plan, Midwest Operating Engineers Welfare Plan, Local 150 I.U.O.E. Vacation Savings Plan and the Local 150 Apprenticeship Fund, and all amendments heretofore or hereafter made thereto, as though the same were fully incorporated herein.

4. This Agreement and the adoption of the Master Agreement and the Amendments and Declarations of Trust referred to in paragraph 3 above, shall be effective as of March 20, 1981, and remain in effect to and including the expiration date of the Master Agreement adopted herein. This Agreement shall continue in effect from year to year thereafter and specifically adopt any Master Agreement entered into between the Union and MID AMERICA REGIONAL BARG. ASSOC. (ILLINOIS BUILDING AGREEMENT) subsequent to the expiration date of the Master Agreement herein adopted unless notice of termination or amendment is given in the manner provided herein.

5. Either party desiring to amend or terminate this Memorandum of Agreement must notify the other in writing at least three (3) calendar months prior to the expiration of the Master Agreement adopted herein.

contributions to several pension and trust funds[2] (Funds) on behalf of any union members Garman might employ in an operating engineer craft. This "prehire agreement," authorized by section 8(f) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(f) (1988),[3] bound Garman to the terms and conditions of an earlier agreement between the Union and a multiemployer bargaining unit.[4] While the Agreement was in force, Garman employed only one covered engineer.

Garman did not terminate the agreement at the end of its first three years, so it was automatically renewed for the period July 1, 1981 to May 31, 1984. But on September 3, 1981, Garman sent letters to the Union and the Funds declaring the agreement "null and void," disclaiming any bargaining relationship or obligation to Local 150 and pledging to make no further contributions to the Funds. The company then filed representation petitions with the NLRB. The Union informed Garman it would take legal steps to enforce the collective bargaining agreement and that the Funds' trustee[5] would take action to enforce Garman's financial obligations.

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[2]Midwest Operating Engineers Pension Plan, Midwest Operating Engineers Welfare Plan, Local 150 I.U.O.E. Vacation Savings Plan and the Local 150 Apprenticeship Fund.

[3]Prehire agreements are generally illegal, except in the construction industry, which enjoys a statutory exemption under section 8(f).

[4]Garman had formerly been a member of the Northern Illinois Building Contractors Association, which delegated its bargaining authority to Mid America Regional Bargaining Association, but withdrew in 1975.

[5]While the Funds and Union are distinct entities, their relationship is close. William F. Martin is both President-Business Manager of Local 150 and trustee of the Funds. Whether either party can represent both parties' interests is not material to our decision.

The legal proceedings then began. Local 150 filed an unfair labor practice charge with the NLRB in October 1981, arguing that Garman committed unfair labor practices under section 8(a)(1) and (a)(5), 29 U.S.C. § 158(a)(1), (a)(5) (1976 & Supp. V), by repudiating the contract and withdrawing recognition of the Union. Garman moved to join the Funds as necessary parties, but this was denied. In February 1982 the General Counsel issued a complaint, alleging that Local 150 had exclusive bargaining authority for Garman's employees and that Garman had illegally repudiated the agreement and refused to bargain. The proposed remedy for the unfair labor practices included compensation to the Funds for the missed contributions.

Meanwhile, the Funds sought payment. In November and December the Funds sent delinquency notices to Garman. The Union and the Funds subsequently filed suit for an alleged violation of ERISA, 29 U.S.C. §§ 1132, 1145.[6] Judge Williams stayed the matter on May 2, 1984, pending the outcome of the NLRB proceeding.

The ALJ's September 29, 1983 decision found no unfair labor practice in Garman's repudiation. The opinion recognized the vitality of the Board's rule in *John Deklewa d/b/a John Deklewa & Sons*, 282 NLRB 1375 (1987), *aff'd sub nom. International Ass'n of Bridge, Structural and Ornamental Iron Workers v. NLRB*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S.

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[6]ERISA section 515 provides a remedy for contributions due from employers, regardless of most potential defenses:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145 (1988). The trustee is authorized to pursue collection by 29 U.S.C. § 1132(a)(3), (d)(1) (1988).

889, 109 S.Ct. 222, 102 L.Ed.2d 213 (1988) ("*Deklewa*"), prohibiting unilateral termination of a prehire agreement. (Our circuit affirmed *Deklewa*'s principles in *NLRB v. Bufco Corp.*, 899 F.2d 608, 612 (7th Cir. 1990).) But the ALJ held that Garman did not violate the principle because of the Board's "one-man rule." This rule, first announced in *Foreign Car Center, Inc.*, 129 NLRB 319 (1960), states that an employer does not violate section 8(a)(5) when the refusal to bargain involves a single-employee unit.

The Board's December 14, 1987 decision affirmed the findings of the ALJ with respect to the prehire agreement.[7] The Board held:

> The [ALJ] . . . dismissed the allegation in the complaint because of the "one-man unit" rule. This rule holds that the Board will not find that an employer has violated Section 8(a)(5) when the refusal to bargain involves a single-employee unit. *Foreign Car Center*, 129 NLRB 319 (1960).
>
> We agree with the judge that under the facts of this case, the allegation of an 8(a)(5) violation concerning the Operating Engineers should be dismissed.

Decision and Order at 5. Local 150 petitioned for review in this court, but the petition was dismissed on a joint motion under Fed. R. App. P. 42(b). (Garman was not an adverse party.) The district court then granted the Funds' motion to reinstate the case.

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[7]The ALJ and the Board also found that Garman had violated section 8(a)(1) by interrogating employees about union support, creating the impression that recall to work was conditional on union withdrawal, implying that job status was conditioned on union withdrawal, assisting in preparation of a decertification petition and promising improved benefits. Decision and Order at 6 (Dec. 19, 1987). These holdings were not part of the district court proceeding and are not before us.

In her order reinstating the action, Judge Williams indicated that she would give "collateral estoppel effect to the NLRB's determination that a contract existed between July 1, 1981 and May 31, 1984." Mem. Op. and Order (June 23, 1989). On cross motions for summary judgment the district court ruled that the company's unilateral repudiation violated the holding in *Deklewa* and the company's obligation under ERISA section 515. Mem. Op. and Order (Apr. 5, 1990). The Company was held liable for $19,424.30 in unpaid contributions, $3,884.86 in liquidated damages and $528.00 in audit fees. Garman submitted a motion to reconsider. In its denial of the motion, the court clarified the holding:

> Defendant Garman's motion to reconsider is denied. Whatever the effect *on the NLRB* of the "one-man unit" rule as to the NLRB's power to declare an unfair labor practice, as far as this court is concerned, the April 5, 1990 order states the law to be applied in this ERISA collection case: A collective bargaining agreement bound the parties; Garman is liable for ERISA payments. The court rejects Garman's argument to not apply *Deklewa* retroactively. Not applying *Deklewa* would be contrary to ERISA and to the policy considerations underlying ERISA.

Docket Entry (Apr. 27, 1990) (emphasis in original). Garman now contends that the district court failed to afford appropriate preclusive effect to the Board's decision under the doctrines of res judicata and collateral estoppel and failed to defer to the primary jurisdiction of the NLRB. The Funds respond that the NLRB ruled only on the unfair labor practice claim--not the ERISA claim--and that Judge Williams was therefore entitled to find Garman in violation of ERISA.

II.

A. Standard of Review

We review the district court's holding on summary judgment *de novo*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Moodie v. School Book Fairs, Inc.*, 889 F.2d 739, 743 (7th Cir. 1989). Garman appeals from the final judgment by the district court. We accordingly do not rule on the merits of the NLRB unfair labor practice proceeding.

B. *Preclusive Effect of the Board's Decision*

The central question in this case is what effect Garman's repudiation had on its obligations under the NLRA and ERISA. Garman's thesis is that the Board's decision established the parties' rights under both the NLRA and ERISA. The Funds claim that even though the Board found that Garman did not violate the NLRA, the district court was not precluded from finding that Garman had run afoul of ERISA.

1. *Res Judicata and Collateral Estoppel*

Garman first argues that because the Funds' claim before the NLRB included collection of the allegedly delinquent contributions, the matter should not have been decided anew by the district court. Res judicata, or claim preclusion, bars relitigation of a claim that a party raised or could have raised in a prior adjudication. The Supreme Court has held that agency adjudication of a factual matter can be res judicata in later proceedings. *United States v. Utah Construction, & Mining Co.*, 384 U.S. 394, 422, 86 S.Ct. 1545, 1560, 16 L.Ed.2d 642 (1966).

Garman's argument fails because the NLRB lacks jurisdiction to consider the ERISA claim. Enforcement claims by a fiduciary under ERISA may be brought in federal court only. 29 U.S.C. § 1132(e)(1) (1988). Because the NLRB lacked jurisdiction, the claim under ERISA did not merge into the earlier proceeding. *Restatement (Second) of Judgments* § 26(1)(c); *cf. Rockford Mutual Ins. Co. v. Amerisure Ins. Co.*, 925 F.2d 193, 196-97 (7th Cir. 1991) ("Res judicata precludes a party from raising even

those issues it failed to raise in a prior action, but only if the issue could have been raised."); *Washam v. J.C. Penney Co.*, 519 F.Supp. 554, 558-59 (D.Del. 1981) (NLRB's resolution of unfair labor practice claim not res judicata as to EEOC's race discrimination claim (and vice versa) since neither agency has jurisdiction to consider both claims). Even if the General Counsel's complaint requested, and the Board authorized, compensation to the Funds as a remedy for an unfair labor practice, the Board could not authorize a remedy under ERISA.

Collateral estoppel is a different matter. Garman argues that because the issue of the agreement's enforceability was resolved in the NLRB proceeding, the Funds should be precluded from relitigating the matter. Collateral estoppel prohibits relitigation of an issue of fact or law when the issue is actually litigated, determined by a final judgment and essential to the judgment of a prior tribunal. *Restatement (Second) of Judgments* § 27; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5, 99 S.Ct. 645, 649 n.5, 58 L.Ed.2d 552 (1979); *Rockford Mutual Ins. Co.*, 925 F.2d at 198. Agency adjudications are afforded collateral estoppel effect, provided appropriate safeguards are met. *Utah Construction & Mining*, 384 U.S. at 421-22 & n.18, 86 S.Ct. at 1559-50 & n.18 (agency's finding of fact entitled to collateral estoppel in most cases).

Whether an obligation arises under ERISA involves two distinct questions: the existence of a contractual relationship covered by the act, and whether a violation occurred. The district court afforded collateral estoppel effect to the Board's ruling on the existence of a contract. The Board conclusively found that Garman had entered into a contract that ran through May 31, 1984, Decision and Order at 4 n.6, and the court gave this finding preclusive effect. Garman now claims this holding to be dicta, but it was vital to the agency's holding because, without it, the Board need not have reached the one-man rule issue. The court concluded that the Company's obligation under ERISA similarly extended to May 31, 1984.

However, the Board's finding that the one-man rule barred a remedy under the NLRA did not resolve the issue of a potential remedy under ERISA. Defenses to the validity of a labor contract and liability under ERISA's section 515 present distinct issues. In *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc), our court stated:

> [A] plan may enforce the writings according to their terms, if "not inconsistent with law". The pension or welfare fund is like a holder in due course in commercial law . . . or like the receiver of a failed bank . . . -- entitled to enforce the writing without regard to understandings or defenses applicable to the original parties.

Id. at 1149 (citations omitted). The opinion continues:

> The text of § 515 is adapted to its purpose, making promises enforceable "to the extent not inconsistent with law". If the contract provides for the commission of unlawful acts, it will not be enforced. . . . If the employer simply points to a defect in its formation--such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact under labor law--it must still keep its promise to the pension plans.

Id. at 1153 (citation omitted); *see also Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 314 (2d Cir.), *cert. denied*, 111 S. Ct. 511, 112 L.Ed.2d 524 (1990); *Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 1553 (D.C. Cir.) ("Since the NLRB, in applying the National Labor Relations Act, made an inquiry different from the one that the ERISA case law requires . . . , we see no basis for giving the NLRB's decision issue-preclusive effect.") (Thomas, J.), *cert. denied*, ____ U.S. ____, 111 S. Ct. 347, 112 L.Ed.2d 311 (1990). The district court properly refused to permit the one-man rule to impair the contract's

validity under 29 U.S.C. § 1145. Collateral estoppel therefore does not automatically preclude an ERISA remedy when the company avoids liability for an unfair labor practice under the NLRA.

The issues are further distinguished, as in the res judicata context, by the jurisdictional division between the NLRB and the district court. The *Restatement* recognizes that collateral estoppel should not apply when "[a] new determination of the issue is warranted by . . . factors relating to the allocation of jurisdiction between [the two tribunals]." *Restatement (Second) of Judgments* § 28(3).[8] As discussed above, the district court's exclusive jurisdiction over ERISA claims distinguishes the issue before it in this case from the issue that was before the NLRB.

In *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed.2d 830 (1983), the Court assessed whether a union could enforce the terms of a prehire agreement in an action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988), prior to repudiation by one of the parties. The Court held that such an action was permissible and distinguished the obligations under the contract from majority status and representation issues. The Court held:

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[8]Comment (e) to this section provides a particularly apt analogy:

> [A] determination in a state court action on a patent license agreement upholding the defense that the patent was invalid for want of invention would not be held binding in a subsequent federal court action for patent infringement if the Congressional grant of exclusive jurisdiction in patent infringement cases to the federal district courts is construed to require otherwise.

Congress's vesting of jurisdiction over labor disputes in the NLRB and over ERISA claims in the district court demonstrates its intent that for ERISA purposes the court have authority to assess the Agreement's validity anew.

> A § 8(f) prehire agreement is subject to repudiation until the union establishes majority status. However, the monetary obligations assumed by the employer under a prehire contract may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support in the relevant unit.

461 U.S. at 272, 103 S.Ct. at 1759. Despite both parties' claim of support from *Todd*, the opinion affords little help because it was undisputed there, unlike in this case, that the prehire agreement had not been repudiated. Moreover, the Court did not address possible enforcement under ERISA, although it stressed the "critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters a prehire contract." *Id.* at 267, 103 S.Ct. at 1757.

Garman's final argument is that the district court's holding violates section 515's prescription that an employer's obligations under the act must not be "inconsistent with law" because the holding now conflicts with the Board's one-man rule. This argument has two flaws. First, as we held in *Central States*, many of the defenses available under the NLRA or under traditional contract law do not fly under ERISA. The one-man rule may remain valid for purposes of unfair labor practice proceedings while counting for naught when the contract is cognizable under ERISA. Similarly, even if a contract's arbitration clause becomes inoperative due to repudiation, as the district court found in *Chicago Truck Drivers, Helpers and Warehouse Workers Union v. Pratt & Lambert, Inc.*, 1989 WL 157270, 1989 U.S. Dist. LEXIS 15034 (N.D. Ill. 1989), enforcement under ERISA (not alleged in that case) is not foreclosed.

Second, it could be argued that for the district court to have held otherwise would have been inconsistent with our holding in *Bufco* that prehire agreements cannot be unilaterally repudiated,

which has not yet been modified in relation to the one-man rule. This case is not before us for review of the NLRB's holding, and Garman restricts its arguments to the preclusive effect of the Board's decision, so we are not prepared to discuss the merits. In addition, we note that although the rendering tribunal does not determine the preclusive effect of its opinion, the Board clearly considered its decision to be for purposes of the NLRA only:

> The complaint alleged that the Respondent violated Section 8(a)(5) and (1) by repudiating the contract and withdrawing recognition from the Operating Engineers. The judge found that the Respondent had not merged into the multiemployer unit and that the Respondent was bound by the 1981-1984 master agreement, but dismissed the allegation in the complaint because of the "one-man unit" rule. This rule holds that the Board will not find that an employer has violated Section 8(a)(5) when the refusal to bargain involves a single-employee unit.

Decision and Order at 5.

Our holding does not conflict with those cases in which an NLRA obligation is a necessary predicate to an ERISA claim. In *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108 S.Ct. 830, 98 L.Ed.2d 936 (1988), a trust fund sued for contributions allegedly owed when an employer refused to negotiate after the expiration of a collective bargaining agreement. The Court held:

> [B]oth the text and the legislative history of §§ 515 and 502(g)(2) provide firm support for the Court of Appeals' conclusion that this remedy is limited to the collection of "promised contributions" and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to

> make postcontract contributions constitutes a violation of the NLRA.

484 U.S. at 548-49 (citation omitted). The trust fund in *Laborers Health* had no explicit agreement giving rise to an obligation, and the fund could hope to collect only if there was a duty to continue bargaining--clearly a question for Board competence. Here, Garman's liability under section 515, appropriately addressed by the district court, arose directly from the contract that Garman entered, even if the repudiation is not an unfair labor practice.

2. *Primary Jurisdiction*

[5] Garman also Claims that the district court should have deferred to the Board's holding under the primary jurisdiction doctrine. For an issue to be subject to the Board's primary jurisdiction, the issue must arguably be subject to section 7 or 8 of the NLRA. *See San Diego Building Trades Council v. Garman*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.ed.2d 775 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."); *DeSantiago v. Laborers Int'l Union, Local No. 1140*, 914 F.2d 125, 129 (8th Cir. 1990) (also citing cases). Because the Board lacked jurisdiction to consider the ERISA claim, it does not enjoy primary jurisdiction as to this issue. The Funds' ERISA claim is therefore not subject to the Board's primary jurisdiction. Moreover, even if the NLRB had jurisdiction over the ERISA claim, the principles of contract interpretation and federal law at stake do not require initial adjudication by the Board.

III.

The NLRB's order regarding the Union's 8(a)(1) and 8(a)(5) claims did not preclude the Funds' ERISA claim in district court and did not resolve the issue of ERISA liability. Moreover,

because the NLRB lacked jurisdiction to consider the ERISA claim, res judicata did not bar the claim. This appeal has not addressed the Board's application of the one-man rule in the prehire agreement context.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM F. MARTIN, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 82 C 6140
	)	
GARMAN CONSTRUCTION CO.) a corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Mr. Martin and others, trustees of an employee benefit plan, are suing Garman Construction Company for failing to make payments on behalf of beneficiaries of the plan. The complaint was brought under the Labor-Management Relations Act, 29 U.S.C. § 185(a) and the Employee Retirement Income Security Act, 29 U.S.C. § 1145. Garman Construction brought several affirmative defenses, among them that no collective bargaining agreement was in effect during the relevant period of this suit. Garman Construction accordingly asked to dismiss this case with leave to reinstate after the National Labor Relations Board had ruled on the affirmative defense. The NLRB issued its decision on December 14, 1987. Mr. Martin moves to reinstate this case. The motion is granted.

In its December 14, 1987 Decision and Order, the NLRB found that:

> In March 1981 [Garman Construction Co.] signed another agreement with the [Union] which was substantially identical to the 1978 memorandum. The master agreement ran from July 1978 to June 1981 and con-

> tained a provision which stated that it would continue in effect unless timely notice of termination was given. [Garman Construction] did not provide timely notice of termination and thereby became bound by the next master agreement, which ran from July 1981 to 31 May 1984.

Garman Construction Company, 287 NLRB No. 12, n.6. Mr. Martin is suing under ERISA, 29 U.S.C. § 1145:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

A federal district court's jurisdiction for collection actions under ERISA is provided for in 29 U.S.C. § 1132(e). See also *Teamsters Local No. 429 v. Chain Bike Corp.*, 643 F. Supp. 1337, 1340 (E.D. Pa. 1986).

Determinations of fact by the NLRB are given collateral estoppel effect, if those determinations are "made in a proceeding fully complying with procedural and substantive due process, and if the findings are upon material issues supported by substantial evidence." *Glaziers & Glassworkers Local #707 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1341 (9th Cir. 1982). The NLRB's proceeding meets this standard, and in any case, Garman Construction does not contend that the proceeding was procedurally unfair of that for some other reason it should not be given collateral estoppel effect. This court will accordingly give collateral estoppel effect to the NLRB's determination that a contract existed between July 1, 1981 and May 31, 1984.

Since a contract existed during the relevant period of this suit, Mr. Martin is seeking contributions "under the terms of a collectively bargained agreement," 29 U.S.C. § 1145, and this

court has subject-matter jurisdiction. *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 108 S.Ct. 830 834-35 (1988). Mr. Martin's motion to reinstate this case is granted. This case is set for a pretrial conference June 28, 1989, at 9:30 a.m.

ENTER:

Signed
Ann Claire Williams, Judge
United States District Court

Dated: Jun 23, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM F. MARTIN, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 82 C 6140
	)	
GARMAN CONSTRUCTION CO., a corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

In this ERISA collection case, the court has already given collateral estoppel effect to an NLRB finding that the parties were bound by a collective bargaining agreement which ran from July 1, 1981 to May 31, 1984. See *Martin v. Garman*, 82 C 6140, slip op. at 3 (June 23, 1989 N.D. Ill.). Garman argues that it repudiated the agreement on September 1, 1981, that the NLRB acknowledged this is its opinion, and that the court should give collateral estoppel effect to that fact. The court cannot do so, since it would violate the holding in *John Deklewa & Sons v. NLRB*, 843 F.2d 770, 779 (3d Cir. 1988): "Neither employees nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements."

Since there was a collective bargaining agreement, Garman is liable for ERISA contributions under 29 U.S.C. § 1145:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent no inconsistent with law, make such

contributions in accordance with the terms and conditions of such plan or such agreement.

The court grants summary judgment to Mr. Martin. Since Garman apparently does not object to Mr. Martin's damage calculation, with the exception of attorney's fees, the court enters judgment in the amount of $19,424.30 for unpaid contributions; $3,884.86 for liquidated damages; and $528.00 for audit fees. Attorney's fees will be discussed at a settlement conference set for April 10, 1090 at 10:30 a.m.

Signed
Ann Claire Williams, Judge
United States District Court

Dated: APR 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM F. MARTIN, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 82 C 6140
	)	
GARMAN CONSTRUCTION CO., a corporation,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Defendant Garman's motion to reconsider is denied. Whatever the effect *on the NLRB* of the "one-man unit" rule as to the NLRB's power to declare an unfair labor practice, as far as this court is concerned, the April 5, 1990 order states the law to be applied in this ERISA collection case: A collective bargaining agreement bound the parties; Garman is liable for ERISA payments. The court rejects Garman's argument to not apply *Deklewa* retroactively. Not applying *Deklewa* would be contrary to ERISA and to the policy considerations underlying ERISA.

Signed
Ann Claire Williams, Judge
United States District Court

Dated: APR 27, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM F. MARTIN, et al.,	)	JUDGMENT IN A CIVIL CASE
Plaintiff,	)	
v.	)	No. 82 C 6140
GARMAN CONSTRUCTION CO., a corporation,	)	
Defendant.	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is entered in favor of plaintiff, WILLIAM F. MARTIN and defendant, GARMAN CONSTRUCTION CO., in the amount of $10,424.30 for unpaid contributions; $3,884.86 for liquidated damages; and $528.00 for audit fees.

APRIL 9, 1990 — Date

H. STUART CUNNINGHAM — Clerk

Signed
(By) Deputy Clerk

287 NLRB No. 12

D--4902
Freeport, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GARMAN CONSTRUCTION COMPANY

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 325, AFL--CIO — Case 33--CA--5672

LOCAL UNION NO. 150, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL--CIO — Case 33--CA--5673

DECISION AND ORDER

On 29 September 1983 Administrative Law Judge Arline Pacht issued the attached decision. The General Counsel filed limited exceptions and a supporting brief, and a brief in support of part of the judge's decision. The Respondent[1] and Local 150,

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[1]The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

The Respondent has made a motion to reconsider denial of the request for review in Cases 33--RM--199, 33--RM--200, and 33--RM--202 and a motion to consolidate review of "RM" proceedings with the appeal in Cases 33--CA--5672 and 33--CA--5673. The General Counsel filed an opposition to the Respondent's

International Union of Operating Engineers, filed exceptions and supporting briefs. The General Counsel and the Respondent filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

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motions. The Respondent filed a response to the General Counsel's opposition. The Respondent's motions are denied.

judge's rulings, findings,[2] and conclusions[3] Only to the extent consistent with this Decision and Order.

The Respondent is "an employer engaged primarily in the building and construction industry" within the meaning of Section 8(f) of the Act. In *John Deklewa & Sons*, 282 NLRB No. 184 (Feb. 20, 1987), the Board overruled *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), *enf. denied sub nom. Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine, and modified unit-scope rules in 8(f) cases. As set forth in *Deklewa* (above at slip op. 8), the Board decided to apply the following principles in 8(f) cases:

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[2]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3]We correct the following minor errors in the judge's decision: in the jurisdictional section of the decision, the judge inadvertently omitted stating that Carpenters Local 790 was a labor organization within the meaning of Sec. 2(5) of the Act; in the first sentence of sec. B, the judge inadvertently used the word "Contractors" instead of "Carpenters" and the Carpenters' contract expired on May 31, 1981, not on March 3, 1981; and in sec. B, Respondent's Defenses, par. 6, the phrase should read "from 1978 to May 31, 1981."

In sec. B, "Allegations of Restraint," par. 23, the judge inadvertently stated that the Respondent could file and had filed decertification petitions. Sec. 9(c) of the Act gives an employer the right to file a representation petition and employees the right to file a petition for an election to decertify a union.

In Conclusions of Law 6, we note that the phrase "of petitions" should be "a petition," as the judge found that the Respondent encouraged only one decertification petition.

We also make the following changes in the judges citations: *Airborne Freight Corp.*, 263 NLRB 1376 (1982), enf. denied 728 F.2d 357 (6th Cir. 1984); *Neon Sign Corp.*, 229 NLRB 861 (1977), enf. denied 602 F.2d 1203 (5th Cir. 1979); *Inta-Roto Inc.*, 252 NLRB 764 (1980), modified 267 NLRB 1026 (1983).

> (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3); (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e); (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Applying *Deklewa* to the instant case, we conclude that the Respondent did not violate Section 8(a)(5) and (1) of the Act with respect to the International Union of Operating Engineers, Local No. 150, Laborers Local Union No. 727, or the Northwestern Illinois District Council of Carpenters, Local No. 790.

In 1970 the Respondent joined the Northern Illinois Building Contractors Association (NIBCA), a multiemployer group, which negotiated agreements on behalf of its members and area trade unions, including the Operating Engineers, the Laborers, and the Carpenters. In 1975 NIBCA delegated its bargaining authority to a multistate organization, the Mid-America Regional Bargaining Association (MARBA). MARBA subsequently negotiated three master agreements with the Operating Engineers, the Laborers, and the Carpenters.[4] In December 1975 the Respondent's president, Tom Garman, notified NIBCA, in writing, of the Respondent's decision to withdraw from NIBCA. The withdrawal did not take effect until the expiration of the master agreements

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[4]The agreement with the Operating Engineers ran from 1 July 1975 to June 1978. The agreement with the Laborers ran from 1 May 1975 to 30 April 1978.

The agreement with the Carpenters ran from 17 June 1975 to 31 May 1977. The Respondent's president then signed a 1-year agreement with the Carpenters which expired on 31 May 1978.

in 1978. As the judge found, by June 1978 the Respondent was no longer formally bound by any agreement.

1. After June 1978 the Respondent did not enter into any bargaining relationship with the Laborers or the Carpenters. Thus, under the fourth *Deklewa* principle, as of the expiration of the 1975--1978 bargaining agreements, the Unions did not enjoy a presumption of majority status, and the Respondent was free to repudiate the 8(f) bargaining relationships.

The judge concluded that the Respondent violated Section 8(a)(5) and (1) with respect to the Laborers and the Carpenters by refusing to recognize and bargain collectively with these Unions.[5] As the judge's conclusions turned on whether the Respondent owed bargaining or contractual obligations to the Unions after June 1978, which under *Deklewa* it did not, we will reverse the judge and dismiss these allegations in the complaint.

2. After June 1978 the Respondent did enter into a bargaining relationship with the Operating Engineers. In 1978 Tom Garman signed a memorandum agreement which bound the Respondent to the Operating Engineers' master agreement.[6] Since 1978 however, the Respondent had employed only one member of the Operating Engineers, employee Jerry Simler, and had made regular, monthly contributions to the Union's fringe

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[5]The judge found that the Respondent had adopted the Laborers' and Carpenters' master contracts through its actions in following numerous provisions of the master contracts. We do not find this adoption-by-conduct doctrine to be applicable in 8(f) cases.

[6]In March 1981 the Respondent signed another agreement with the Operating Engineers which was substantially identical to the 1978 memorandum. The master agreement ran from July 1978 to June 1981 and contained a provision which stated that it would continue in effect unless timely notice of termination was given. The Respondent did not provide timely notice of termination and thereby became bound by the next master agreement, which ran from 1 July 1981 to 31 May 1984.

benefit funds on his behalf. The Respondent stopped its contributions on 3 September 1981, when it sent a letter to the Operating Engineers stating that the master agreement "is null and void as of the present date."

The complaint alleged that the Respondent violated Section 8(a)(5) and (1) by repudiating the contract and withdrawing recognition from the Operating Engineers. The judge found that the Respondent had not merged into the multiemployer unit and that the Respondent was bound by the 1981--1984 master agreement, but dismissed the allegation in the complaint because of the "one-man unit" rule. This rule holds that the Board will not find that an employer has violated Section 8(a)(5) when the refusal to bargain involves a single-employee unit. *Foreign Car Center*, 129 NLRB 319 (1960).

We agree with the judge that under the facts of this case, the allegation of an 8(a)(5) violation concerning the Operating Engineers should be dismissed. We find that the Respondent was party to a binding 8(f) contract under *Deklewa* and that under the third *Deklewa* principle, the Respondent's operation was a single-employer unit that had not merged into the multiemployer unit.[7] Because there had never been more than a single member of the Operating Engineers in the Respondent's employ during the 3

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[7]Member Stephens notes that the third *Deklewa* principle actually refers to the unit that will normally be regarded as appropriate for the purpose of processing election petitions under Sec. 9(c) and (e) of the Act; and we have no petition pending before us here. It is conceivable that the third *Deklewa* principle would not necessarily govern all determinations of the unit to which an employer was bound pursuant to its signing of a collective-bargaining agreement. However, given our adoption of the judge's finding that the Respondent had not merged its operation into the multiemployer unit when it signed the separate memorandum agreement in 1981, Member Stephens concludes that we can appropriately find that the Respondent's own operating engineer work force was the unit in which the Respondent was bound, by its agreement, to recognize the Operating Engineers.

years prior to the Respondent's repudiation, however, we find that the "one-man unit" rule is the proper rule in this case.[8]

We agree with the result reached by the judge and dismiss the 8(a)(5) and (1) allegation in the complaint concerning the Operating Engineers.

3. The judge found five 8(a)(1) violations. The judge found that the Respondent engaged in the following conduct: interrogated the employees about their support of the Unions;[9] created the impression that the employees' recall to work was conditioned on their withdrawal from union membership; implied to the employees that their job status was conditioned on withdrawing from the Unions; assisted in the preparation of a

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[8]We note that had the facts been different and had the unit of operating engineers been subject to fluctuations in size, only temporarily decreasing in size to a single employee unit, the Respondent's actions would have violated Sec. 8(a)(5) of the Act. See *Deklewa*, above at fn. 62.

[9]In *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the Board stated that the proper analysis is whether, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Member Stephens notes that because it was not unlawful for the Respondent to repudiate its bargaining agreement with the Unions after the contracts expired, and because the Respondent could therefore lawfully operate without a union agreement thereafter, mere questions to employees whether they would object to working without a union agreement would not, standing alone, be unlawful under Sec. 8(a)(1). To the extent that the Respondent coupled questions about union sympathies with references to stacks of applications from nonunion employees, however, the questions could reasonably have tended to coerce its previously union-represented employees, most of them now on layoff status, into believing that abandonment of union membership was the price of a job. On that basis, he joins the majority in upholding the unlawful interrogation finding.

decertification petition regarding Carpenters' Local 790; and promised the employees improved benefits. We affirm the judge.

In conclusion, we affirm the judge's finding of the five 8(a)(1) violations and we dismiss the allegations of 8(a)(5) violations concerning the Operating Engineers, the Laborers, and the Carpenters.

Amended Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Garman Construction Co., Freeport, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their membership in or support of labor organizations or ask employees if they will work with nonunion employees or what they think about going nonunion.

(b) Creating the impression that the employees' recall to work is conditioned on their withdrawal form membership in or support of the Union.

(c) Implying to employees that their jobs are dependent on their withdrawing from union membership.

(d) Initiating or assisting in the preparation of a decertification petition.

(e) Promising the employees improved insurance benefits if they withdraw from union membership.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Freeport, Illinois place of business copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 33, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days–in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations not specifically found are dismissed.

Dated, Washington, D.C. 14 December 1987

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[10]If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their membership in or support of labor organizations or ask employees if they would work with nonunion employees or what they think about going nonunion.

WE WILL NOT give employees the impression that their recall to work is conditioned on withdrawing from membership in or support of any union.

WE WILL NOT imply to employees that their jobs are dependent on their withdrawal from union membership.

WE WILL NOT initiate or assist employees in the preparation or circulation of any petition, nor sponsor any movement to decertify Carpenters Local 790, or any other labor organization.

WE WILL NOT promise employees improved insurance benefits or other benefits if they withdraw from membership in or support of any union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

GARMAN CONSTRUCTION COMPANY

(Employer)

Dated------ By ----------

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Savings Center Tower, 16th Floor, 411 Hamilton Boulevard, Peoria, Illinois 61602, Telephone 309--671--7068.

JD-430-83
Freeport, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GARMAN CONSTRUCTION
COMPANY

and Case No. 33-CA-5672

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS
OF AMERICA, LOCAL UNION
NO. 325

and Case No. 33-CA-5673

LOCAL UNION NO. 150,
INTERNATIONAL UNION
OF OPERATING ENGINEERS,
AFL-CIO

Richard Simon, Esq., of
Indianapolis, IN, for
the General Counsel.
Lorraine Schmall and Lewis
Sigman, Esqs., Baum,
Sigman & Gold, Ltd., of
Chicago, IL, for the
Operating Engineers,
Local 150.
Gerard C. Smetana, Esq. of
Arvey, Hodes, Costello &
Burman, of Chicago, IL,
for the Respondent.

DECISION

Statement of the Case

ARLINE PACHT, ADMINISTRATIVE LAW JUDGE: This case was heard in Rockford, Illinois over a 6-day period beginning October 13 and concluding on November 5, 1982, pursuant to charges filed on October 5, 1981 against Garman Construction Company (hereinafter Respondent or Garman). A consolidated complaint and notice of hearing issued on February 19, 1982 and was amended on August 25 and November 1, 1982. The Respondent filed its answer to the complaint and amended complaint on April 6 and September 7, 1982, respectively. Subsequently, on May 10, 1982 the Respondent filed a motion for partial summary judgment and request for review of the Regional Director's Decision and Order which was denied by the Board.[1]

Upon these pleadings, the principle questions presented by the complaint are whether the Respondent: (1) violated Section 8(a)(5) and (1) of the Act by repudiating its collective-bargaining agreement with the International Union of Operating Engineers, Local No. 150 (hereinafter Operating Engineers or Local 150); unlawfully withdrew recognition and refused to bargain collectively with the Operating Engineers and with the Laborers Local

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[1]On September 9 and October 1, 1981 the Respondent filed four petitions seeking representation elections, upon a claim that unions, three of which are involved in this proceeding did not represent a majority of its employees in an appropriate unit of all of its construction workers. A representation hearing began on October 5 and ended on November 3, 1981. On March 30, 1982 the Regional Director issued a Decision and Order in which he took administrative notice that a Consolidated Complaint had issued with respect to the Laborers, Carpenters and Operating Engineers. Consequently, he determined that the petitions in the representation cases affecting those unions should be dismissed, subject to reconsideration upon final disposition of this unfair labor practice proceeding. After the Board denied Respondent's Request for Review, Garman filed a motion for reconsideration which the Board also denied by telegraphic order dated October 8, 1982.

Union No. 727 (Laborers, or Local 727) and the Northwestern Illinois District Council of Carpenters, Local No. 719 (Carpenters or Local 719);[2] and unilaterally altered the terms and conditions of its employees' employment; (2) Whether the Respondent violated Section 8(a)(1) of the Act by coercively questioning employees as to their membership in and support of the respective unions; promising benefits to employees who withdrew from union membership, threatening job loss to those who did not and encouraging the distribution of a decertification petition.

Upon the entire record, including the demeanor of the witnesses and after due consideration of the briefs filed by counsel for the General Counsel (hereinafter General Counsel),

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[2]In August 1982, Carpenters Local 719, the organization which initially represented Respondent's employees, merged into Carpenters Local 790. After notifying the approximately 15 members of Local 719 and 50 members of Local 790 of the forthcoming merger vote, a meeting was held where separate balloting took place among the two groups. Approximately 12 to 15 men belonging to Local 719 voted unanimously by secret ballot in favor of the merger. Thus, the merger was accomplished pursuant to procedures which provided sufficient guarantees for free choice and due process. *See, N.L.R.B. v. Commercial Letter, Inc.*, 496 F.2d 35 (8th Cir. 1974). Further, four of Local 719's officers continued holding office with the merged Local 790. Although a new business agent now services the area which encompasses the Respondent, the collective-bargaining agreements which Local 719 had with various employers prior to the merger remained in effect. Where, as here, two sister locals merge, where the affected employees approve of the merger and where there is no disruption of pre-existing collective-bargaining relationships, it is clear that substantial continuity of representation from one local to another is retained. Since "there is no change in the essential identity of the bargaining unit," (*Montgomery Ward and Co., Inc.*, 188 NLRB 551, 552-553 (1971)), I conclude that Local 790 has lawfully replaced Local 719.

the Respondent[3] and the Operating Engineers, I hereby make the following:

FINDINGS OF FACT

Jurisdiction

Respondent, a contractor in the business of residential and commercial building construction, is, and has been at all times material herein, an Illinois corporation with its office and principal place of business in Freeport, Illinois. During the past 12 months, a representative period, in the course and conduct of its business operations, Respondent has purchased and caused to be transferred and delivered to its Freeport facility, goods and materials valued in excess of $50,000 which was transported directly from states other than the State of Illinois. Based upon the foregoing admitted facts, I find that Respondent is now, and has been at all material times herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The Operating Engineers, Carpenters Local No. 719, and Laborers Local No. 727, are labor organizations within the meaning of Section 2(5) of the Act.

THE ALLEGED UNFAIR LABOR PRACTICES

Background

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[3]Respondent submitted a Motion For Leave To File a Reply Brief dated May 15, 1983, to which General Counsel objected. The Board's Rules and Regulations make no provision for reply briefs, suggesting they are not favored. Moreover, Respondent's counsel offered no compelling reason justifying such a brief. Since the matters he sought to address were or could have been raised at the hearing and in his brief, another document added to the plethora of paper already filed in this case is unwarranted. Accordingly, Respondent's motion is denied.

The Respondent's longstanding relationship with organized labor can be traced to the early 1960s when it entered into its first collective-bargaining contract with the Operating Engineers. In 1970, Respondent joined the Northern Illinois Building Contractors Association (NIBCA), a multi-employer group which negotiated agreements on behalf of its members with various trade unions including the Operating Engineers, Laborers and Carpenters. In 1975, NIBCA delegated its bargaining authority to a multi-state organization, the Mid-America Regional Bargaining Association (MARBA). In that year, MARBA negotiated 3-year master agreements with the Operating Engineers and Laborers which expired in June and April 1978 respectively, and a 2-year contract with the Carpenters.

In December 1975, Tom Garman, then Respondent's President, advised NIBCA in writing of the Company's decision to withdraw from the Association. Since this notification was given during the term of NIBCA's outstanding contracts with the respective unions, the withdrawal did not take effect until those contracts expired.[4] On May 31, 1978, a contract which Respondent independently executed a year earlier with the Carpenters adopting the NIBCA master agreement for the balance of its term, also expired. Thus, by June of 1978, Respondent was no longer formally bound to collective-bargaining agreements with any of the Unions party to this proceeding.

Respondent's Relationship with the
Unions Since 1978

Respondent's present dispute with the Charging Parties stems from events occurring since 1978. In May of that year, Garman Construction Company was purchased by Harry Johnson and William Nample. Since the transfer of ownership did not significantly alter the way in which the Company functioned, the

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[4]*See, Charles D. Bonnano Linen Service v. N.L.R.B.*, 102 S. Ct. 720 (1982); *Retail Associates, Inc.*, 120 NLRB 388 (1958).

Respondent is, by admission, a successor. The Respondent's relationship with the Unions since the sale have been far more problematic. Because the operative facts which govern Respondent's legal obligations to the Operating Engineers differ somewhat from those affecting the Laborers and Carpenters, the issues affecting each Union will be examined separately below.

A. The Operating Engineers

In 1978, MARBA entered into a new master agreement with the Operating Engineers effective from July of that year to June 1981. Jerry Shepardson, the Operating Engineer's business agent, testified that shortly after the agreement was executed, and he learned that Garman no longer belonged to NIBCA, he visited Tom Garman (then Respondent's President) at his Freeport, Illinois office on 12 North Commercial Street and obtained his signature on a Memorandum Agreement. As Shepardson explained, such memoranda agreements bind the signer to the master contract and typically, are presented to individual employers who do not belong to the Association. At the representation hearing, although Garman denied having executed such a document and the Operating Engineers were unable to produce a copy of the signed Memorandum, there is other evidence which suggests that Garman did execute such an instrument.[5] I refer to a booklet Shepardson produced which contained a computerized listing of every company which had signed a Memorandum Agreement with the Operating Engineers as of March 28, 1979.

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[5]Garman failed to appear at the unfair labor practice proceeding, thereby preventing any resolution of the credibility conflict in his favor on the basis of demeanor. However, I note that he was willing to enter into at least one other similar agreement with the Carpenters in 1977. Further, at the time he withdrew from NIBCA he indicated to the Association's executive secretary that he contemplated further bargaining by stating that "it would be far better to negotiate on a separate basis with those two or three unions we would be pressured by." These circumstances fortify my conclusion that Garman did sign a Memorandum in 1978.

Garman was among the companies so listed at the Commercial Street address.

Three years later, Shepardson again found it necessary to obtain a signed Memorandum from Respondent. Shepardson related that he met with Johnson on March 20, 1981 and after explaining that Union officials were unable to locate a copy of the 1978 Agreement, requested that another Memorandum be executed so that Respondent could lawfully continue to contribute to the Union's fringe benefit funds on behalf of its employee, Jerry Simler. Simler was the only member of the Operating Engineers on Respondent's work force. Johnson read and signed the document.

With the exception of then current dates, the 1981 Memorandum Agreement was substantially similar to its 1978 predecessor. The pertinent provisions of the Memorandum were as follows:

1. The Employer recognizes the Union as the sole and exclusive representative for and on behalf of the employees of the Employer within the territorial and occupational jurisdiction of the Union.

2. The parties agree that the Employer is a part of a single bargaining unit made up of all employers parties to the master agreement adopted herein.

3. The parties do hereby adopt the master agreement dated July 1, 1978 entered into by and between the Union and the mid-America Regional Bargaining Association . . . and the parties do hereby mutually agree to be bound by the terms and conditions of that master agreement and the agreement and declaration of trust of the mid-West Operating Engineers pension plan. . . .

4. This agreement and the adoption of the master agreement and the agreements and declaration of the trust referred to in paragraph 3 above, shall be effective as of March 20, 1981 and

remain in effect to and including the expiration date of the master agreement adopted herein. . . . This agreement shall continue in effect from year to year thereafter and specifically adopt any master agreement entered into between the Union and mid-America Regional Bargaining Association. . . .

5. Either 5. Either Party desiring to amend or terminate this Memorandum of Agreement must notify the other in writing at least three (3) calendar months prior to the expiration of the master agreement adopted herein.

In substance, then, the Agreement provides for recognition of the Union as the exclusive bargaining agent for employees performing Operating Engineers' work within the Union's jurisdiction; for merger of the Respondent into the multi-employer bargaining unit; for adoption of the terms of the master agreement between the Union and MARBA; for payments into the Operating Engineers trust funds and for continuation of the agreement from year to year unless either party notifies the other within 3 months prior to expiration of the master agreement of an intent to amend or terminate. Thus, by virtue of the Memorandum, Respondent was required to provide written notice of a desire to terminate its contractual arrangements with the Operating Engineers 3 months prior to the June 30, 1981 expiration of the master contract. It did not do so. Instead, by letter dated September 3, 1981, Respondent notified the Union that the master agreement "is null and void as of the present date." Concurrently, Respondent notified the trustees of the Operating Engineers' fringe benefit fund that it was discontinuing payments. Since at least 1978, when Simler was admitted to full membership in the Operating Engineers,[6] until September 1981 when Respondent sent the above-mentioned letters to the Union and trustees, it made regular, monthly contributions to the various Operating Engineers' fringe benefit funds on Simler's

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[6]Prior to his becoming a full Union member in 1978, Simler's status with the Operating Engineers was as a "temporary referral."

behalf. The payments were accompanied by report forms, most of which Johnson signed, which indicated that the contributions were made pursuant to the Company's collective-bargaining agreement with the Union.[7] In addition, from 1978 until the summer of 1981, Respondent paid Simler wage rates which conformed with those set forth in the MARBA-Operating Engineers Master Agreement. Respondent also assigned Simler to work which involved the use of heavy equipment traditionally falling within the craft lines of the Operating Engineers.

In mid-September 1981, the Operating Engineers negotiated another master contract with MARBA retroactive to July 1, 1981 and expiring May 30, 1984. However, in September 1981, Respondent ceased making payments to the fringe benefit funds for Simler and failed to grant the increased wage rates specified in the new master agreement.

The Parties' Contentions

The General Counsel and the Operating Engineers argue that by signing the Memorandum Agreement in March 1981, Respondent agreed that it would be bound to the 3-year master contract between MARBA and the Union, effective from July 1981 through May 1984. They further submit that by virtue of language in the Memorandum stating that the employer agrees to be part of a single bargaining unit, the Respondent was merged into the multi-employer association. Since the Operating Engineers had majority support among the employees who worked for employers in the multi-employer unit, the Union's status as bargaining representative may not be challenged for the life of the contract. Counsel reason that since Respondent is included within the multi-employer unit and since the Union's majority status is determined within the framework of that unit,

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[7]Instruction cards sent to the Respondent together with the report forms expressly stated that the fringe benefit fund payments were owed pursuant to the collective-bargaining agreement.

it is irrelevant that the Respondent employs only one member of the Operating Engineers. Under their theory of the case, Garman's execution of the 1981 Memorandum Agreement makes the Respondent a party to a mature and fully enforceable contract under Section 9(a) of the Act. Consequently, they assert that Respondent's repudiation of that contract and its withdrawal of recognition from the Operating Engineers in September 1981 violates Section 8(a) (5) and (1) of the Act.

The Respondent raises numerous defenses, not all of which need be examined to resolve those allegations in the complaint bearing on the Operating Engineers. At this juncture, it will suffice to outline the following points in Respondent's argument. First, the Respondent contends that Johnson did not sign the Memorandum Agreement in March 1981 with any intention of binding the Respondent to the terms of the MARBA contract. Rather, he merely complied with the business agent's request for his signature in order to legitimize fringe benefit payments into the funds for Simler. Respondent next maintains that the Memorandum was a prehire contract under Section 8(f) of the Act and, therefore, voidable, unless the Union can establish that it obtained majority support in an appropriate unit comprised solely of Garman employees. Alternatively, the Respondent urges that even if the Respondent is bound to a contract otherwise ripe under Section 9(a) of the Act, it is unenforceable since a one-man unit is inappropriate. For the reasons discussed below, I am constrained to conclude that under prevailing Board precedent, a union does not have majority status in an appropriate unit, where, as here, the unit is comprised of a single employee. Consequently, the Respondent's repudiation of its contract with the Operating Engineers does not constitute conduct which will be remedied under the Act.

Discussion

As found above, Respondent's attempted withdrawal from NIBCA in 1975, during the term of the extant collective-bargaining agreement, did not take effect until the expiration of that

agreement in 1978. At that time, however, and even without specific notice to the affected unions, the Respondent ceased being a member of the multiemployer association. Thereafter, in 1978, and again in 1981, Respondent's representatives signed Memorandum Agreements which bound it to the terms and conditions of the collective-bargaining agreements negotiated between MARBA and the Operating Engineers. The Memorandum Agreement signed by Johnson in 1981, contains explicit language adopting the master agreement. Where the provisions of a document, such as those at issue here, are clear and unambiguous on their face, the Board has rejected parole evidence which would alter or modify their terms. See, *R.J.E. Leasing Corporation*, 262 NLRB No. 49 (ALJD at 11) (1982). Moreover, Johnson admitted reading the Memorandum prior to signing it and, therefore, can hardly claim he was unaware of its provisions. It is impossible to believe that Johnson, who currently is President of the Company and primarily responsible for its financial management and who was its bookkeeper and vice president for at least 10 years prior to his acquisition of the business, could fail to appreciate the significance of signing such an instrument. Further, by contributing to the trust funds and by observing the Operating Engineers' traditional craft lines, Respondent's objective conduct demonstrated an awareness that it was obligated to adhere to the Master Agreement. Accordingly, I find that by executing the Memorandum Agreement in March 1981, and by failing to give timely notice of an intent to amend or terminate the Agreement before the next contract was renegotiated, the Respondent bound itself to the 1981--1984 contract between MARBA and the Operating Engineers.

A separate legal question exists as to whether by signing the Memorandum Agreement the Respondent was merged into the multi-employer unit. The test used by the Board and approved by the courts in determining whether or not such a merger has occurred turns on whether the employer has indicated an unequivocal intention to be bound by group bargaining. *N.L.R.B. v. New York Typographical Union*, 632 F.2d 171, 183 (2d Cir.

1980). The Board's position on this issue is succinctly stated in *Ruan Transport Corporation*, 234 NLRB 241, 242 (1978):

> The essential element warranting the establishment of multiple-employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than by individual action. The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations. . . . As a general rule, the Board has found that an employer does not become a part of a multiemployer bargaining group . . . where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf.

Under the standards articulated in *Ruan*, the record establishes that the Respondent merely adopted a contract which it had in no way authorized others to negotiate on its behalf.

There is no question that Respondent did not participate in the negotiations between MARBA and the Operating Engineers either in 1978 or 1981. Neither can it be said that Respondent directly authorized NIBCA to engage in group bargaining in its behalf. To the contrary, Respondent attempted to withdraw from the multi-employer association as early as December 1975. The Operating Engineers did not receive notice of Respondent's intent to withdraw in 1975, but by 1978, the Local clearly knew that Garman was not represented by the Association since, as Shepardson acknowledged, Memoranda of Agreement are not presented to member-employers. In these circumstances, it would be incorrect to presume from Respondent's past participation in the multi-employer group that subsequent to its withdrawal, it continued to assent to group bargaining. *Cf. New York Typographical Union No. 6*, 236 NLRB 317 (1978). Indeed, by withdrawing from NIBCA, the Respondent demonstrated the opposite intent as of that point in time--that is, to abandon group action and pursue an independent course of bargaining.

The General Counsel and the Operating Engineers do not rely on Respondent's past history, however, to prove that it bound itself to group bargaining in 1981. Rather, they contend that by executing the Memorandum of Agreement, the Respondent agreed to become a "part of a single bargaining unit made up of all employers to the master agreement." Notwithstanding a commitment such as this, the Board has indicated that such language is insufficient to merge an employer into a multi-employer bargaining unit. The above-quoted language in the Memorandum of Agreement signed by Johnson in 1981 is virtually identical to language contained in the contract described in *Ruan Transport*. Yet, the Board held in *Ruan* that similar language was insufficient to "clearly demonstrate that the Respondent delegated authority to the Council to represent it in future negotiations." *Ruan Transportation Corporation, supra*, at 242. See also, *New York Typographical Union, supra*. Thus, delegated authority even if clearly implied in the Memorandum Agreement does not meet the Board's standard of "clear evidence of an unequivocal intent on the part of an employer to be bound by group bargaining."[8] *Id.* There is nothing in the record of this case which evidences Respondent's unequivocal delegation of authority to NIBCA to bargain in its behalf as required by *Ruan*.

The General Counsel and the Operating Engineers rely principally on *Amado Electric Inc.*, 238 NLRB 37 (1978) and *Authorized Air Conditioning Company*, 236 NLRB 131; *enf'd.* 606 F.2d 899 (9th Cir. 1979) to support its contention that by signing the Memorandum of Agreement, the Respondent merged into the multiemployer bargaining unit. These cases are clearly distinguishable on their facts. Although the employer in *Amado Electric* was not a member of the association, it had signed letters

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[8]But see, *N.L.R.B. v. New York Typographical Union*, 632 F.2d 171 183-84 (2nd Cir. 1980) where the court held that the individual employer who had signed an agreement in advance of negotiations was bound by a master contract when it was reached.

of assent specifically authorizing the group to represent it in collective bargaining. In *Authorized Air-Conditioning*, the employer voluntarily applied for membership in the association and was accepted. See also, *Custom Colors Contractors*, 226 NLRB 851, 853 (1976) *enf'd. sub nom N.L.R.B. v. Beckham, Inc.*, 564 F.2d 190 (5th Cir. 1977) where the employer attended almost all of the multiemployer negotiating sessions and never indicated an intent not to be bound by the contract. These cases suggest that if a single employer is to merge into a larger multiemployer unit, its intent must be expressed to the larger unit and not to the union alone.

Compared to the actions of the employers in the above-cited cases, it cannot be said that Garman manifested the intent requisite to inclusion in the bargaining group. It merely signed a Memorandum of Agreement as a single employer acting on its own behalf. Accordingly, the conclusion that must be drawn is that although the Respondent bound itself to the terms of the MARBA contract, it did not thereby merge into a multi-employer unit. Consequently, the Operating Engineers' majority status must be examined within the confines of a single business entity. *See, Hageman Underground Construction*, 253 NLRB 60, 68 (1980).

There is no dispute that Simler was the only member of the Operating Engineers in Respondent's employ. In this regard, the Board's position on one-man units is well-settled: the Board will not certify such a unit, nor will it find that an employer has violated Section 8(a)(5) where the refusal to bargain involves a single employee unit. *Crispo Cake Cone Company*, 190 NLRB 352, 363 (1971); *Foreign Car Center, et. al*, 129 NLRB 319, 320 (1960); *Al and Dick's Steak House, Inc.*, 129 NLRB 1207, 1208 (1961); *Louis Rosenberg, Inc.*, 122 NLRB 1450, 1452 (1959). It is true that "the Act does not preclude bargaining with a union on behalf of a single employee, if an employer is willing. . . ." *Foreign Car Center, supra*, at 320. *See also, Teamsters Local 115 (Villa-Bar Co.)*, 157 NLRB 588 (1966). At the same time, the Board has "never held that an employer's refusal to bargain with

a representative on behalf of a one-man unit is a refusal to bargain within the meaning of Section 8(a) (5)." *Foreign Car Center, supra*, at 320. The rationale for this position is as follows:

> The Board has held that it will not certify a one-man unit because the principal of collective bargaining presupposes that there is more than one eligible person who desires to bargain. The Act, therefore, does not empower the Board to certify a one-man unit. By parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a unit. *Id.*

The Board's policy as expressed in *Foreign Car Center*, dictates the outcome of the instant situation and compels the conclusion that the Operating Engineers do not enjoy majority status in an appropriate unit of Respondent's employees. Accordingly, the Respondent's repudiation of the contract and refusal to recognize and bargain with the Operating Engineers does not constitute conduct which the Board will redress under Section 8(a)(5) and (1) of the Act. Therefore, the allegations in the instant complaint addressed to that conduct must be dismissed.

B. The Laborers and Carpenters

In 1978, NIBCA renegotiated 3-year master agreements with the Laborers and Contractors effective to March 3, 1981. However, as mentioned above, Respondent's contracts with these Unions terminated in May and June 1978 respectively. Since that time Respondent has not signed a written agreement with either labor organization.

However, from 1978 to September 3, 1981, Respondent chose to follow a number of the provisions in the Laborers' and Carpenters' master contracts. Thus, the record shows that Respondent continued to employ Union members exclusively and with some exceptions, assigned them to tasks which fell within the

jurisdiction of the employees' respective craft unions. There is also evidence that the Respondent utilized the services of the Unions' hiring halls to obtain the services of Laborers and Carpenters on at least several occasions.[9] In addition, Respondent continued to pay wages in accordance with contractual pay scales. In fact, when the master agreements provided for increased wage rates for Laborers from $10.45 to $11.40 in June 1980 and from $11.93 to $12.83 for Carpenters, Respondent followed suit with identical rate increases for employees belonging to each Union. Moreover, Respondent paid wage rates to certain of its superintendents which were consistent with requirements in the Carpenters' contract. Thus, the 1978-1981 master agreement provided that Carpenter foremen were to receive not less than 7 percent per hour over journeymen's scale or .835 cents from 1979 to 1980 and .898 cents over scale the following year. In compliance with this provision, senior Carpenter foremen, Jacobs, Kehl and Seefeldt, received $1.00 an hour over the contractual rate for journeymen. Similarly, Respondent made regular contributions to the Laborers and Carpenters fringe benefit funds (welfare, health, pension and vacation) on behalf of its employee-members. The Respondent also paid to each Union a working dues assessment based on a small percentage of each employee's hourly rate as provided by the collective-bargaining agreements. Respondent's last working dues assessments or payments into the funds was in September 1981. The record further establishes that Respondent paid staff Carpenters and Laborers overtime rates in accordance with the master agreements; Carpenters received double time, Laborers, time and one-

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[9]Employee Reichart stated that he was referred to Respondent by the Laborers' business agent. In addition, I credit the testimony of the Carpenters' business agent, Herb Hayen, who recalled that he received occasional telephone calls between 1978 and 1981 from the Respondent requesting that carpenters be referred. Johnson denied that he utilized the services of the hiring hall, but he acknowledged that his superintendents who were members of the Carpenters, also hired employees. Therefore, it is possible that he might be unaware any of them had called the hiring hall. (See also *infra*, p. 21, n. 21.).

half. Employees also received show-up pay as provided in the contract; that is, several hours pay for appearing on the job when conditions such as inclement weather prevented them from working a full day.[10] In addition, Carpenters received special shift pay for hours worked other than the regular 8 to 4:30 daytime shift as specified in the contract. Another indicator of adherence to the terms of the master agreement stems from Respondent's participation in a June 1981 meeting with Carpenters business agent Hayen and Laborers' business agent Planthaber at which a dispute was resolved involving a Carpenter employee usurping work that rightfully fell within the Laborers' jurisdiction.[11]

Respondent's conduct during the summer of 1981 sheds further light on its subjective intent as to its collective-bargaining obligations. As will be discussed in greater detail below, between May and September 1981, Johnson commented to employees on various occasions that the Company was either going or thinking of going non-union. He asked employees how they would react to this and also inquired as to whether they would agree to work with non-union personnel. The Respondent explained that its comments came during a bleak economic period when it was losing jobs in competitive bidding to non-union contractors. Respondent decided that to make ends meet it had to hire employees at wages lower than the rates paid to its current work force. During the same time period, Johnson met with Union representatives in part to explore entering into new collective-bargaining arrangements. Finally, on September 3, 1981, Respondent notified the Union that they no longer represented

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[10]Respondent implied that it was unaware that its employees received show-up wages. Because someone in authority had to release the employees for the day and because Johnson had intimate knowledge of the economic aspects of the business, I find Respondent's attempt to deny knowledge of the show-up pay practice not worthy of belief.

[11]Respondent's denial of this incident will be discussed below.

a majority of Garman employees and, in effect, withdrew recognition from the Laborers and Carpenters.

The Position of the Parties

The General Counsel acknowledges that the Respondent effectively withdrew from NIBCA in 1978 when the Association negotiated new collective-bargaining agreements with the Carpenters and Laborers. However, based upon the employment practices described above, the General Counsel submits that the Respondent impliedly adopted the 1978-1981 Laborers' and Carpenters' master collective-bargaining agreements with NIBCA. Therefore, when these contracts expired in 1981, Respondent had a continuing duty to recognize and bargain with the Unions. Instead, the General Counsel maintains that beginning in late spring 1981, the Respondent embarked on a course of conduct designed to induce the employees to withdraw their membership in and support of the Unions to which they belonged. The Respondent's summer long anti-union campaign culminated with its September 3 letters announcing that it was withdrawing recognition. It was at this point in time that Respondent ceased making payments to the Unions' trust funds, began hiring nonunion employees, and assigned workers to tasks without regard to their former craft jurisdictional lines. The General Counsel contends that these and other unilateral alterations in the terms and conditions of employment, as well as the Respondent's withdrawal of recognition and refusal to bargain, violate Section 8(a)(5) and (1) of the Act.

Respondent denies that it adhered to or was bound by the terms of the collective-bargaining agreements with the Laborers and Carpenters. Instead, Respondent maintains that its conduct demonstrated the reverse proposition; that is, that its actions negated a collective-bargaining relationship with either Union. Respondent further contends that neither the Carpenters nor the Laborers represented a majority of employees in their respective

craft areas.[12] However, in an effort to resolve its controversies, Respondent claims it met and bargained with representatives of the Carpenters and Laborers in the summer of 1981, but that these negotiations resulted in an impasse so that the issuance of a bargaining order in this case would be futile.

In light of the parties' conflicting positions, the outstanding issues in this case are as follows: 1. Whether the Respondent followed a course of conduct which manifested its intent to be bound by the terms of collective-bargaining agreements with the Carpenters and Laborers; 2. Whether the Carpenters or the Laborers enjoyed majority support among Respondent's employees and 3. Whether the Respondent and the Unions bargained to impasse.

1. Adoption of the Union Contracts

In support of the position that the Respondent's conduct gave rise to agreements implied by law, the General Counsel relies principally on *Vin James Plastering Company*, 226 NLRB 125 (1976), *Haberman Construction Company*, 236 NLRB 79 (1978)[13] and *Remodeling by Oltmanns, Inc.*, 263 NLRB No. 169 (1982). Although the factual patterns in these cases vary, they follow a uniform analytic approach. Each case starts with the premise that the existence of a labor agreement does not turn on strict common law contract principles or on a reduction of an agreement to writing. Rather, in determining if there is a binding contract, the Board asks whether the employer has manifested an

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[12]Respondent also asserted in the representation proceedings that a single bargaining unit composed of all its employees was the only appropriate one. The Regional Director found that the evidence warranted a different conclusion and, accordingly, held in his Decision and Order that separate craft units were appropriate. That ruling stands as law of the case.

[13]*Aff'd*, 618 F.2d 288 (5th Cir. 1980); *modified on rehearing*, 641 F.2d 351 (5th Cir. 1981).

intention to adhere to the collective-bargaining agreement in question and then looks to the employer's conduct to determine whether or not it manifests that intention. If it does, the terms of the contract have binding effect and the employer is estopped to assert the absence of a formally executed agreement. *Vin James Plastering Company, supra*, at 131; *Haberman, supra*, at 86.

With these principles in mind, the Administrative Law Judge (ALJ) found in *Vin James* that the following conduct gave rise to an implied agreement: (1) wages were paid according to the contract scale; (2) trust fund and other benefit contributions were made in the amount and manner set forth in the contract. Further, these payments were made on forms stating "this report is evidence of an intention to comply with Article 11 of the collective-bargaining agreement"; (3) the employer adhered to the dues checkoff provisions in the contract; (4) the employer usually called upon the union representative; (5) with one exception, the employees were union members; (6) the employer implied to the union that it would sign a collective-bargaining agreement (6) although the employer was never a member of a multi-employer association, it was identified as an employer in contracts prior to the one at issue; (7) the employer was familiar with the terms of the contract and was present during the negotiation of an earlier contract between the multi-employer association and the union; (8) in attempting to withdraw recognition, the employer acknowledged that it had voluntarily abided by the terms of the agreement. On this record, the ALJ concluded that Vin James "manifested an intention to adopt and be bound by the agreement and, consequently, is estopped" from asserting as a defense the fact that it had not entered into a formal written agreement with the Union.

Although the term estoppel is relied upon in *Vin James*, the traditional common law principles of equitable estoppel need not be present for the Board to find an employer bound to the terms

of an agreement.[14] Rather, an inspection of the case law suggests that the Board applies the estoppel principle in situations where it finds that an employer had derived some benefit from its adherence to a labor agreement.[15] In the Board's view, when an employer obtains an advantage by virtue of a contractual relationship, he should thereafter be foreclosed from denying that relationship when it entails burdens as well. For example, in *Vin James, supra*, at 129 the ALJ cites *Marquis Elevator*, 217 NLRB 461, 466 (1974) where the Board stated that ". . . here as in *Manner Research, Inc.*, . . . the continued utilization of the welfare, pension and educational funds, the use of the Union as a source of employees and for the settlement of grievances, 'demonstrate the existence of a continuing relationship between the Respondent and the Union.'" In an earlier case, *Lewis et al v. Cable et al*, 107 Fed Supp. 196, 197-198 (W.D. PA. 1952), the District Court stated: "Defendant cannot by his acts and declarations pretend to be bound by the agreement so as to prevent strikes and repercussions and then, when full liability under said agreement is asserted seek to disaffirm it." Similarly in *Haberman, supra*, 618 F.2d at 294-295, n.2, the court found persuasive grounds to enforce a contract in "the fact that respondent both enjoyed the benefits of the contract and abided by its provisions."

The Board found in *Haberman, supra*, 236 NLRB at 79, that although the employer's adherence to the contract was not as

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[14]*See, N.L.R.B. v. J.D. Industrial Insulation Co., Inc.*, 615 F.2d 1289 (10th Cir. 1980) where the Court observed that the formal doctrine of equitable estoppel requires a showing by the party claiming the benefit of the estoppel of (1) lack of knowledge and of the means to obtain knowledge of the true facts; (2) good-faith reliance upon the misleading conduct of the party to be estopped and (3) detriment or prejudice from such reliance.

[15]*Cf., F.M.L. Supply Inc.*, 258 NLRB 604, 614 (1981) where the ALJ found purposeful deception by the employer as a ground for invoking the traditional estoppel doctrine. However, the ALJ made clear that deception was only one among a number of factors which the Board may consider in contract adoption cases.

extensive as that identified in *Vin James*, in its totality it was sufficient to show compliance with the terms of an outstanding collective-bargaining agreement. There, the employer (1) contributed to the union's pension funds; (2) used the union as a source of employees; (3) maintained job stewards; (4) paid union scale wages and abided by the holidays set forth in the contract; (5) stated that it had decided to go "open shop" thereby implying that it considered itself a union contractor; (6) used union members exclusively and (7) sought the union's consent to start the working day an hour earlier than mandated under the contract.

Remodeling by Oltmann's, Inc., 263 No. 169 (1982) presents facts strikingly similar to those present in the instant case. In affirming the ALJ, the Board agreed that even where the employer had never seen the collective-bargaining agreement and his knowledge of the contract was limited to that derived from his union employees, he nevertheless created a bargaining relationship by complying with a number of provisions in the agreement over a 6-year period. For example, the employer paid contractual wages and fringe benefits not including travel expenses or show-up wages; hired only union members and turned to the union hiring hall on at least one occasion. Additionally, the work shift and holidays to which the employer adhered were those set forth in the contract. The conduct outlined above was sufficient to support the ALJ's conclusion that Oltmann's adherence to contractual terms demonstrates:

> . . . . the existence of a continuing relationship between Respondent and the union. Also, at all times Respondent considered itself to be a union contractor. In this regard, I note that Respondent never disavowed its bargaining relationship with the Union and do not accept Oltmanns less than candid explanation--that he meant only that Respondent paid the Union's prevailing wages and fringe benefits and nothing more. . . . Finally, the fact that Oltmanns had no contact with Union officials subsequent to June 30, 1971 is of little

> significance inasmuch as, by Oltmanns' own admission, Respondent honored virtually all consequential provisions of the Union's contracts with the Association and instituted all requested changes in fringe benefits contributions. *Id.* (ALJD at 16).

Parallels between *Remodeling By Oltmanns* and the present case abound. As in Oltmanns, Garman honored many of the "economic and several of the non-economic provisions of the Union's successive collective-bargaining agreements with the Association. . . ." manifesting an intent to be bound thereto. *Id.* (ALJD 16). As noted above, Garman contributed to the Unions' pension funds, used Union members exclusively in accord with recognition clauses in the collective-bargaining agreements, obtained referrals, albeit infrequently, from the Unions, paid union wage scales, including overtime and special rates for job superintendents, paid show-up wages, working dues assessment and overtime rates as called for in each Union's collective-bargaining agreement. Garman's assignment of employees to work along craft lines, its exclusive use of union employees in accordance with the recognition clause, its observation of the working hours provided for in the agreement, and its resolution of a jurisdictional dispute in accordance with the grievance provisions of the contract all signify compliance with the collective-bargaining agreements' non-economic provisions. The conclusion in *Remodeling by Oltmanns* that "Respondent considered itself to be a union contractor" and that "it never disavowed its bargaining relationship with the Union" is equally applicable to the circumstances of this case. *Id.* (ALJD at 17). It is apparent that Garman would not tell its employees that it intended to go non-union, would not identify its competitors as non-union contractors and would not withdraw recognition from the employees' bargaining representatives unless it considered itself to be a union contractor. Moreover, here, as in *Oltmanns*, Respondent never affirmatively disclaimed a collective-bargaining relationship with either Union until issuing its September 3 letters. In this regard, I note that Nampel did not contradict business agent Collier's testimony that they often met at jobsites.

Significantly, there is no suggestion in the record that during such encounters, Nampel clarified Respondent's position as to the cessation of its collective bargaining obligations. The fact that the Respondent failed to sign and return participation agreements sent by the Laborers does not indicate, as Respondent contends, a repudiation of a collective-bargaining relationship. In spite of its failure to execute those agreements, the Respondent continued to make monthly contributions to the Union's fringe benefit funds. In these circumstances, Respondent's implementation of many terms in the master agreements between MARBA and the Carpenters and Laborers demonstrates the existence of a continuing relationship between Garman and those Unions.

Respondent's Defenses

The Respondent's principal argument is that aside from paying wages comparable to area union rates and making contributions to the Unions' fringe benefits funds, it observed none of the other provisions of the multi-employer agreement; it neither intended to nor did it in fact conform its behavior to any collective-bargaining agreement. Thus, Garman points out that it did not utilize the Union's hiring hall, did not hold pre-job conferences with Union representatives, did not have on-site job stewards and subcontracted to non-union firms. The Respondent further contends that the Union abandoned its members by failing to police the agreement or holding the Respondent accountable for its breaches.

The Respondent's first contention--that its only adherence to the contract was the payment of union scale wages and fringe benefit contributions--is flatly contradicted by a record which demonstrates implementation of numerous key provisions. Further, it is not critical that an employer follow every condition of a labor contract in order to conclude that a collective-bargaining relationship is established. It is sufficient that the Respondent honored many of the economic and several of the non-economic terms in the Unions' collective-bargaining agreements with MARBA. *See, Remodeling By Oltmanns, supra*, ALJD at 16.

Respondent's contention that the Union abandoned its employees also has no merit. The Laborers' field representative, Collier testified without contradiction that he frequently visited Garman jobsites where he often encountered Respondent's Vice President, Nampel. Carpenter business agent Hayen also testified credibly that he spoke with Johnson on several occasions between 1978 and 1981.[16] Neither does the fact that grievances were not processed prove abandonment. Both the Laborers and Carpenters business agents testified that no grievances were filed by Garman employees during the time period in question when a problem affecting the assignment of an employee arose. Since the Respondent was paying wages according to union scale, forwarding timely and proper contributions to the fringe benefits funds, and in the absence of employee complaints, "there really was no need for contact between the parties to effectuate the bargaining relationship." *Remodeling by Oltmanns, supra*, (ALJD at 16-17). Thus, although the record may show some evidence of neglect and less than assiduous attention to the enforcement of their agreements, the Unions' conduct falls far short of abandonment.

The Respondent further contends that it paid union wages and contributed to the trust funds solely to retain the services and loyalties of competent employees. By this statement, Respondent, perhaps inadvertently, acknowledges that it obtained an advantage in adhering to the terms of the Union contract: it understood that it had to comply with the labor agreement to

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[16]Johnson generally denied having any contacts with either Union other than acknowledging receipt of four letters received from Laborers' business agent Planthaber. However, Johnson also denied having obtained the services of any employees through the Laborers Local, testimony which was convincingly refuted by several employees. If the Respondent contacted the Laborers for referrals it is equally likely that similar contacts were made with the Carpenters, just as Hayen alleged. Further, employee Ken Hudson, who impressed me by his demeanor as a trustworthy witness, testified that Hayen occasionally visited Garman jobsites. Given corroboration of Hayen's testimony in this regard, there is no reason to disbelieve his testimony as to other contacts with Respondent.

attract and retain skilled union craftsman in its employ. Where, as here, an employer clearly benefits from its partial adoption of a contract, there is good reason to estop him from denying that he is not a party to the entire agreement. *See, Vin James, supra; Haberman, supra*, at 86.

Respondent also asserts that no legal consequences should attach to its payments to fringe benefit funds since such contributions were unlawful in the absence of a signed agreement as required by Section 302(c)(5)(B) of the Act.[17] Respondent's argument is premised on *Moglia v. Goeghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969) where the court held that a written agreement is necessary before payments may be made under that section. The same argument was considered and rejected in *Vin James Plastering Company, supra*, at 131. There, the ALJ held that the requisite written agreement--the contract between a contractors association and the charging party union--did exist and satisfied the requirements of Section 302. In *Vin James*, as here, the ALJ noted that counsel for Respondent was arguing not so much that there was no writing rather than that employer was not a signatory to or bound by the writing in question. However, as in *Vin James*, I conclude that the Respondent adopted the written master contract and is bound by its terms. It is that agreement and related documents which fulfill the requirements of Section 302(c)(5)(B).

If the Respondent's compliance with the contractual wage scales or payments to the trust funds were the only indicia of its adherence to the master agreement, such conduct would not, standing alone, suffice to demonstrate the existence of a collect-

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[17]Section 302(c)(5) states:

> It shall be unlawful for any employer . . . to pay . . . any money . . . [to a trust fund]
>
> (c) The provisions of this section shall not be applicable with respect to money paid to a trust fund . . . specified in a written agreement . . . with the employer and employees. . . .

ive-bargaining relationship. *See, Haberman Construction Company, supra* at 86. But as the record evidence in this case clearly establishes, Respondent's adherence to the terms of the master agreements with the Laborers and the Carpenters went well beyond a bare minimum. Based upon the foregoing, I conclude that the Respondent engaged in a course of conduct from 1978 to September 3, 1981, which manifested an adoption of collective-bargaining agreements with the Carpenters and Laborers. Consequently, when these agreements expired, Respondent was obliged to continue recognizing and bargaining with those Unions and to maintain the terms and conditions of employment which were in effect on September 3, 1981, unless, as the Respondent contends, the Unions did not represent a majority of Respondent's employees in their respective craft units or the parties reached impasse in bargaining.

2(a) The Laborers' Majority

Respondent contends that it had reason to doubt the representative status of the Laborers' Union, based on its belief that three employees, Richart, Lott, and Farrar, had withdrawn from the Local at the time it sent its September 3 letter stating the Union no longer had majority support from Garman employees.[18]

Upon the expiration of a contract, an employer may refuse to bargain with a union that it reasonably believes no longer represents a majority of the employees. *Lehigh Lumber Co.*, 230 NLRB 1122, 1128 (1977) *aff'd*, 577 F.2d 727 (3rd Cir. 1978), *cert. denied*, 439 U.S. 928 (1978); *Creative Engineering, Inc.*, 228 NLRB 582 (1977). This is true, however, only if the assertion of a reasonably grounded doubt of the union's continued majority

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[18]The Respondent continues to claim that the appropriate unit is one comprised of all its construction employees. The Regional Director rejected this argument, ruling instead that craft units were appropriate. I rely on the Regional Director's Decision as law of this case.

status arises in a context free of unfair labor practices, where the loss of majority status does not arise from the employer's own unfair labor practices[19] and where the objective facts upon which the employer relies are known at the time the doubt is asserted.[20] *See, Frank Brothers*, 321 U.S. 702, 704-705 (1944); *N.L.R.B. v. Superior Fire Proof Door and Sash Co.*, 289 F.2d 713, 719 (2d Cir. 1961); *Impressions, Inc.*, 221 NLRB 389, 403 (1978). Thus, as a threshold matter, it is necessary to determine whether or not the Respondent engaged in the misconduct giving rise to allegations of Section 8(a)(1) violations.

Allegations of Restraint, Coercion and Interference

A number of allegations in the complaint concern comments made by Johnson and Nampel to various employees that the Company was going "non-union," or thinking of going non-union or inquiring of the men whether they would be willing to work together with non-union labor. One such discussion took place in late May or early June with employees Moore, Lemayer and Simler together with a laid-off employee, Larry Watson. Johnson admitted asking these employees how they would react to working together with nonunion personnel. Simler responded, "I don't think there's any way I'm going to drop my (union) card. It took me too long to get it." Moore raised a question as to how the employees would be covered by insurance to which Johnson replied that there were plenty of insurance plans available. He added, "I'm sure we could get equal or better than what we are paying into the funds now." Nampel mentioned that he had "a stack of applications from non-union men and we're going to give

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[19]*Computer Sciences Corporation, et al.*, 236 NLRB 266, 279 (1978), aff'd, 598 F.2d 613 (4th Cir. 1979); *Pioneer Inn Associates, et al*, 228 NLRB 1263, 1265 (1977), *aff'd*, 578 F.2d 835 (9th Cir. 1978).

[20]*Dayton Motels, Inc.*, 212 NLRB 553, 556 (1974) *aff'd*, 525 F.2d 476 (6th Cir. 1975).

serious consideration to hiring some of them." Watson, who had been out of work for 9 months by this time, commented that the Union had failed to place him. Johnson rejoined, "right, what does the Union really do for you?

On another occasion in early June, Johnson made similar comments to employees Timm and Lott in the presence of a supervisor, Kehl. Kehl and Lott both testified that Johnson told them that the Company wanted to go "non-union"; and that a program with fringe benefits, pension and insurance funds would be established as good or better than those that the Union was offering. At some point during this exchange, Johnson asked Timm what the Union had done for him.

Hudson, a carpenter employed by Respondent from 1976 to August 1981, reported taking part in a similar conversation with Johnson and Nampel in mid-June. Hudson recalled that Johnson said the Company was going non-union; "that it was up to us (the employees) if we wanted to go along and that they would pay us key men . . . union scale and a better health and welfare plan than we had now." Nampel again alluded to the fact that he had a stack of applications in the office submitted by non-union carpenters.

Moore, Simler and Lott were involved in still another of these conversations in mid-July. On this occasion, Bill Nampel told them that Respondent would have to go non-union, and added once again that he had applications stacked high from carpenters who were out of work.

The Respondent submits that its consideration of hiring non-union labor and its inquiries to its employees as to whether or not they would accept such a situation came about because the Company was in financial difficulty having lost a few contracts to non-union competitors. Consequently, Respondent believed that it had to effect cost savings by hiring non-union labor at low wages. However, the Respondent insists that its decision to hire non-union employees posed no threat to the union membership

of its current employees. In fact, Johnson testified on several occasions that he assured employees he had no interest in whether or not they retained their union membership and guaranteed that their wages would remain the same.

The Respondent's disclaimers of any intent to interfere with its employees' support for or membership in the unions to which they belonged are unconvincing. On considering the numerous discussions which Johnson and Nampel initiated, it becomes clear that their comments about the Company going non-union were designed to bring about the employees' abandonment of union membership.[21] Johnson had 12 years experience, first as a bookkeeper, then as vice president and finally as President of Garman. For much of this time, Respondent was affiliated with a multi-employer bargaining association, had collective-bargaining relationships with five craft unions and employed union members exclusively. Nampel had even more exposure to union requirements than did Johnson for until several years before he became an owner of the Company, he was a member of the Carpenters' Union. In light of their experience, they had to know that their union employees were not permitted to work on the same job with non-union labor. Therefore, asking their present personnel if they would be willing to work with non-union labor hardly had an innocent purpose. The real question they were posing was whether or not the current employees would rather forfeit their union membership or forfeit their jobs. If Respondent's officers

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[21]The true measure of Respondent's intentions with respect to its employees retaining their union affiliation is revealed in a letter which Johnson sent on July 12, 1982 to an organization, Americans Against Union Control. He wrote, *inter alia*: "the National Labor Relations Board in Washington have the cases and as you can see we need support in any way possible. We feel that we have contributed both monies and information that can be used for future contractors to break away from union organizations. . . ." Johnson testified under oath that he wrote this letter merely to respond to a request for a political contribution. His attempt to disguise the anti-union purpose of this letter merely confirms the conclusion he was a biased witness who tailored his testimony to serve Respondent's interests.

had no reason to believe that working with non-union labor would have adverse consequences for union members, then there was no reason to ask their questions. The employees certainly had little difficulty in perceiving the thrust of Respondent's inquiry. When the matter was put to Simler, his immediate response was that he would not drop his union card. His reaction was a *non sequitur* unless it was understood that by employing non-union labor, union members were being asked to forego union membership. Another employee, Lott, testified that while he was not an expert on the Union's regulations, he at least knew that "a non-union worker can't work beside union workers." It is inconceivable that Johnson and Nampel were unaware of a fundamental fact known to all of their employees. Johnson and Nampel also were well aware that all current staff members belonged to one union or another. In raising the specter of hiring non-union labor they were, at the very least implying that the Unions' majorities would be diluted if not destroyed, thereby jeopardizing their representative status. Under any circumstance, Respondent's remarks exercised undue interference with, restraint and coercion of the employees in violation of Section 8(a)(1) of the Act.

It is equally clear that Johnson's assurances that the Company could provide insurance and health plans equal to or better than those currently covering the employees were tantamount to promises of benefits offered in an obvious effort to woo the employees away from the Unions. Conversely, the employees could hardly misunderstand the portent of Nampel's references to stacks of employment applications on hand. Taken in context, such comments implied that if the employees chose not to acquiesce to the Respondent's plan to become a non-union shop, they could be readily replaced. By juxtaposing threats to the employees' job security with inducements to repudiate the Unions, Respondent violated Section 8(a)(1) of the Act. *See, N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). I do not agree with the General Counsel, however, that Johnson's remark to Watson, "what has the Union done for you" rises to the level of impermissible interrogation. It was simply an offhand

response to Watson's observation that the Union had been unable to place him. However, when Johnson repeated this same comment to Timm in a subsequent exchange, it was gratuitous and unlawful.

Paragraphs 10(b) and (c) of the consolidated complaint allege that Johnson unlawfully asked an employee if he was dropping out of the union and conveyed the impression that his recall from layoff status was conditioned upon his cessation of union membership.

In support of these allegations, Michael Richart, who was in Respondent's employ at the time of the instant hearing, testified that in early September 1981, while on layoff status, he heard rumors that the Company was going non-union and learned that new non-union employees were hired recently. Acting on this information, he sought out Johnson and asked why he was still laid off. Johnson told him there was a lack of work but that he might be coming back within a week or so. At this, Richart volunteered to Johnson that he might drop out of the Union. Not more than 30 minutes after his meeting with Johnson, Richart received a telephone call from Garman's secretary asking that he return to the office. Richart returned and met with Johnson who asked him what his plans were. When Richart again said he was thinking of dropping out of the Union, Johnson asked to see proof of his withdrawal. He then mentioned that he had a new job and that Richart could start to work the following Monday. In response to the General Counsel's question of whether his submitting proof to Johnson had any bearing on his return to work, Richart answered, "At the time, it just kind of seemed that maybe that would . . . reflect whether I came back to work or not but I can't say for sure. . . ." Richart did return to work shortly thereafter and explained to Johnson that he forgot to bring a copy of the letter with him regarding his withdrawal from the Union. The matter was not raised again. In fact, at the time of his rehire, Richart was 3 months in arrears with his Union dues payments. However, the Union advised him that he need

do nothing about his payments until the instant unfair labor practice proceedings concluded.

The General Counsel submits that Johnson's inquiry about Richart's plans was designed to elicit his intentions as to his Union membership and that the entire incident conveyed to Richart the impression that his rehire was contingent on repudiating that membership. The Respondent counters that Richart volunteered the information that he failed to pay his Union dues. Further, since Richart was paid his former wage rates upon his return and rehired subsequent to the date the Respondent sent the September 3 withdrawal letter to the Union there was little reason for Respondent to be concerned as to whether or not Richart retained his affiliation with the Laborers.

An employer is, of course, free to make reasonable inquiries. Section 8(c) of the Act, implementing the constitutional guarantee of free speech, guarantees that no expression of any view shall be evidence of an unfair labor practice so long as such expression contains no threat of reprisal or promise of benefit. But the Supreme Court has recognized that balancing the right of employees to associate freely against the employer's right of free speech, "must take into account the economic dependence of the employees on their employers and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might more readily be dismissed by a more disinterested ear." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Within this framework, a trier of fact would have to be extremely naive to accept the gloss that Respondent attempts to put on Johnson's remarks to Richart. Richart did not simply spontaneously offer information about his Union membership as Respondent contends. Rather, he had good reason to believe that a lapsed Union member would be far more acceptable to the Respondent than would one whose adherence to the Union was unshakeable, since he knew from a co-worker, Lott, of Respondent's interest in going non-union and was aware that several

non-union men had just been hired. When Johnson asked him about his plans, Richart understood precisely what Johnson meant, responding immediately with information about his intent to withdraw from the Union. Richart's somewhat reluctant admission that he perceived a relationship between his forfeiture of Union membership and his rehire is particularly persuasive since at the time that he gave his testimony he was in Respondent's employ.[22] Further, the rapidity with which Richart was offered reemployment only 30 minutes after he assured Johnson that he would abandon the Union, gives rise to a strong inference of a causal effect between that abandonment and his return to work.

Johnson's explanation as to why he requested documentation from Richart is more than suspicious; it is so implausible as to cast doubt on his entire testimony. It strains credulity to believe that Johnson simply wanted such proof for his office records. It must be born in mind that at this time, the Respondent was on the verge of litigation in which its claim that the Laborers no longer represented a majority of employees was a critical issue. A withdrawal letter from Richart clearly would have evidentiary value. Thus, rehiring Richart at his former wage rate was a small price to pay in return for his withdrawal from the Union.[23] In sum, I do not believe that Johnson's dialogue with Richart was innocent. In the confines of the employer-employee relationship present here, Johnson clearly engaged in a variety of coercive tactics including subtly relaying to Richart that his rehire was a reward for withdrawal from the Union. By such conduct, Respondent violated Section 8(a)(1) of the Act.

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[22]*See, e.g., Sanitas Cura, Inc., d/b/a Parkview Acres Convalescent Center*, 255 NLRB 1164 (1981); *Motz Poultry Company*, 244 NLRB 573, 575 n.7 (1979).

[23]Respondent hoped to reap economic advantages not only by retaining its staff at current wages while pay scales in the collective-bargaining agreements rose, but also by hiring non-union labor at greatly reduced rates of pay.

The complaint alleges that the reinstatement of another employee, Farrar, also was conditioned on his withdrawal from the Laborers' Union.[24] Farrar testified that he was called back to work from layoff during the week of September 23. On his first day back to work Johnson asked Farrar if he belonged to the Union. Farrar replied that he had not paid any dues and therefore assumed he was no longer a member. On hearing this, Johnson laughed and told Farrar to go to work. Based on these facts, the General Counsel asserts that Respondent unlawfully interrogated Farrar and led him to believe that his employment was a consequence of his having dropped out of the Union.

No explication is needed in order to conclude that Respondent's questioning Farrar about the status of his union membership was impermissible interrogation. However, the record does not support the General Counsel's contention that the Respondent led Farrar to believe that reemployment was a consequence of his having dropped out of the Union. There is no evidence that Farrar's recall was in any way related to his Union status for he was recalled before his conversation with Johnson occurred. Moreover, I draw no inference from the ambiguous fact that Johnson smiled and sent Farrar to work when told of his lapsed dues payments.

Paragraphs 10(i) and (k) of the amended complaint accused the Respondent of encouraging, preparing or sponsoring the circulation of two decertification petitions. Carpenters Cliff Jacobs and Ken Hudson testified as to one such petition circulated by a carpenter-superintendent, Harry Seefeldt. Both Jacobs and Hudson recalled that they were working with Seefeldt at a jobsite when Johnson drove up and summoned Seefeldt to his car. After speaking privately with Johnson for several minutes, Seefeldt rejoined Jacobs and Hudson and showed them a letter

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[24]Farrar was first employed in 1978 when he was referred to the Respondent by the Laborers' business agent. During periods of layoff, Farrar worked for himself and returned to Garman when he saw fit.

he had in hand which stated in substance that the signer no longer desired representation by the Carpenters' Local.

In a pre-trial affidavit dated November 12, 1981, Seefeldt, who is now deceased, offered a different version of this incident. According to him, sometime in June 1981, Johnson spoke to him of the Company's difficulties with non-union competition and of his interest in hiring non-union workers. After assuring Seefeldt that his wages would be unaffected, Johnson asked him whether he would work with non-union personnel. Seefeldt said he would do so, notwithstanding the fact that he considered himself a card-carrying carpenter in good standing who had held various offices with the Local. When Johnson asked how the other workers might feel, Seefeldt allegedly offered to prepare and circulate a letter which would assess their views, but told Johnson he had no way to go about it. Seefeldt next attested that he asked Johnson's secretary to type a petition for him. She did so and gave it to him. He recalled vaguely that the message on the petition was that the signer would agree to work with non-union personnel. He showed the petition to his fellow carpenters but neither of them chose to sign it. Seefeldt denied in his affidavit that he told anyone else that Johnson had given him the petition.

Seefeldt's denial as to the source of the letter was unconvincing. It was perfectly clear to Jacobs and Hudson that only Johnson could have been responsible for delivering it to Seefeldt at the work site. Jacobs, who described himself as a very close buddy of Seefeldt's for 40 years, was certain that Seefeldt received the letter from Johnson. He maintained that if Seefeldt had the letter with him prior to Johnson's arrival, he undoubtedly would have shown it to them. Moreover, Jacobs was certain, based on his lengthy association, that Seefeldt could neither have initiated nor carried out the preparation of such a document. I am persuaded not only by Jacobs' friendship with and intimate knowledge of Seefeldt's traits but also by the forthright manner in which he testified that his and Hudson's testimony should be preferred to Seefeldt's affidavit or Johnson's denial of involvement with the petition. Accordingly, I hold Respondent liable for

the preparation and distribution of the decertification petition under the auspices of its agent, Seefeldt.[25] Such activity, of course, violates Section 8(a)(1) of the Act. *See, Lehigh Lumbering Company, supra*, 230 NLRB at 1128; *Federal Pacific Electric Company*, 203 NLRB 571 (1971); enf'd and remanded, 499 F.2d 542 (D.C. Cir. 1974).

The General Counsel also charges that the Respondent encouraged an employee, Lott, to prepare and circulate a second decertification petition. Lott who was initially employed as a laborer, testified that in early June 1981, Johnson mentioned to him that he might be hiring non-union help and asked whether he and other laborers would complain about this. Lott replied that it made no difference to him but offered to get the opinion of his co-workers noting he could not make such a decision on his own. Thereafter, Lott asked the office secretary to type a letter which stated that the workers whose signatures he intended to collect on the letter were willing to work with non-union employees. Lott testified that he did not believe Johnson knew anything about the letter. Although Lott intended to present the letter to each of the laborers then employed by Respondent--Richart, Behl and Farrar, he in fact presented it only to Farrar a few days later. Farrar explained that he agreed to sign the document because he did not want to lose his job over the matter. Lott stated that he mailed the letter to the Board but that it was returned to him for want of a correct address whereupon he simply destroyed it. Lott added that several weeks later he mentioned to Johnson that Farrar had signed a petition but that the letter had been returned to him.

In reliance on *Kit Manufacturing Company, Inc.*, 142 NLRB 957, 964 (1963) *enfg. in part and setting aside in part*, 335 F.2d

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[25]Whether Seefeldt was a statutory supervisor or employee need not be determined here, for it is clear in this instance that his coworkers regarded him as Respondent's agent. *See, Airborne Air Freight Corporation*, 263 NLRB No. 181 (1982); *Aircraft Plating Company, Inc.*, 213 NLRB 664 (1974).

166 (9th Cir. 1964), the General Counsel submits that the Respondent is liable for setting in motion the process which led to the preparation and circulation of the petition. His reliance on that case is misplaced. In *Kit*, the employer expressly authorized and encouraged an employee's circulation of a decertification petition. Here, Lott's testimony is uncontroverted that Johnson neither suggested that such a letter be drafted nor knew of Lott's efforts until after the petition had become a dead letter. Therefore, although Johnson acted improperly in asking Lott whether he would work with non-union labor, I do not find on the basis of this record, that he can be held responsible for encouraging Lott's subsequent course of conduct.

In the latter part of September 1981, Johnson and Nampel, together with Respondent's counsel, Gerard Smetena called a meeting of all current employees. During the course of the meeting, Johnson explained the Company's actions with respect to filing decertification petitions with the Board, discussed the forthcoming hearings and then described the benefits the Company would offer in lieu of those which the Union previously provided. Thus, he assured the workers they would continue to be covered by insurance, a dental program, health care and retirement programs which would match or improve upon the benefits which the employees currently had through their Unions.

Respondent does not deny having made such statements. Rather, it argues that under the Act's guarantees of free speech, it was entitled to present to its employees valid reasons for rejecting union representation. Respondent further argues that at the meeting, assurances were given to the employees that no reprisals would be taken and no adverse consequences imposed based upon their union membership or lack thereof. In contending that it was simply comparing union versus non-union benefits to enable the employees to make a rational choice, Respondent relies on *Dow Chemical Company, Texaco Division et al.*, 250 NLRB 756 (1980); *enforcement denied*, 660 F.2d 637 (5th Cir. 1981). There, the Board held that where decertification proceed-

ings were imminent, the employer could legitimately drew a comparison between wages and fringe benefits which it currently paid to its union as opposed to non-union employees. Reliance on *Dow Chemical* is misplaced for Respondent misses a critical distinction between the facts in that case and those which obtain herein. In *Dow Chemical*, the Board was addressing a situation in which the employer referred to pre-existing, established practices in place for unrepresented employees on its payroll, whereas here, Respondent was merely engaged in speculation as to what might become available. *Eastern Washington Distributing Company*, 216 NLRB 1149, 1154 (1975) correctly states an employer's obligation in these circumstances:

> Even if this had been an initial organization effort and there had been no union demand for recognition or negotiations, Respondent would be under a legal obligation to refrain from using its economic power to influence the choice of its employees . . . The offer of the [new insurance] plan patently was intended to and did carry with it the clear message that the employees could avoid the necessity of paying union dues.

It must also be recalled that prior to this meeting, the Respondent had engaged in a protracted campaign to undermine the employees' support for the Unions. Respondent culminated its anti-union efforts by filing decertification petitions and by withdrawing recognition and refusing to bargain with the Unions to which its employees belonged. Respondent's decision to test its bargaining obligations was made at its peril. It could simply have filed decertification petitions without dangling before its employees the lures of increased benefits. By its conduct, Respondent ran the risk of and did, in fact, violate the Act. Accordingly, I find that Johnson's and Smetana's descriptions of

benefits which were unilaterally offered should the employees repudiate their Unions, violated Section 8(a)(1) of the Act.[26]

Respondent's misconduct, as described above is not simply a series of isolated unfair labor practices. Rather, as a whole, they created an atmosphere of insecurity in which employees understood full well that it was better to abandon the Union than lose their jobs. The Respondent's course of conduct was by its very nature calculated to undermine the employees' support for the Union. Within this context, any loss of majority support for the Laborers must be traced directly to Respondent's unfair labor practices. Three laborers--Lott, Richart, and Farrar were immediate targets of Respondent's importuning. In these circumstances, Respondent cannot rely on its own misconduct to sustain its assertion that management's professed doubt of the Union's majority rested on valid grounds. *See, Computer Sciences Corporation, supra*, at 281; *Lehigh Lumber Company, supra*, at 1128.

Further, the Board insists that reasonable grounds for assertion of a good faith doubt must be known to the employer at the time the refusal to bargain occurred. *See, N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293, 301 n.25 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979). Since Respondent withdrew recognition before it had certain knowledge of Farrar's or Richart's views toward membership, their withdrawal cannot be relied upon by the Respondent to support its professed doubt of the Union's majority status. It follows that the Respondent, having failed to demonstrate that the Laborers did not enjoy majority support among Garman employees, is obliged to

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[26]Since no evidence was adduced to support paragraph 8(g) of the complaint, that allegation shall be dismissed. Some other allegations of Section 8(a)(1) violations set forth in the amended consolidated complaint may have been inadvertently omitted from the foregoing discussion. However, I do not believe it is critical to resolve additional allegations of misconduct since to do so would be cumulative and would not materially affect the relief which I propose below.

recognize and bargain with the Local as its employees' collective-bargaining representative.

2(b) The Carpenters' Majority

By early September 1981, the number of Respondent's employees who belonged to the Carpenters Local was reduced to three--Seefeldt, Jacobs and Moore.[27] The Respondent contends that Seefeldt and Jacobs were supervisors as defined by the Act and, therefore, must be excluded from the bargaining unit. Consequently, the Respondent argues that since only one non-supervisory member of the Carpenters remained on its staff, the unit was inappropriate and it was thereby released from any duty to bargain. The General Counsel maintains that Seefeldt and Jacobs did not exercise supervisory powers. However, even without including them in the unit, counsel submits that the reduction of force among Respondent's regular complement of carpenters was a temporary phenomenon. Therefore, the Union's majority is a continuing one and the Respondent could not lawfully withdraw recognition.

It is well-settled that the burden is upon the Respondent to prove that the depletion in its ranks was permanent in nature. *See, Crispo Cake Cone Co. Inc.*, 190 NLRB 352 354 (1971), *aff'd*, 464 F.2d 233 (8th Cir. 1972); *National Dairy Products Corporation, Sealtest Southern Dairy Division*, 127 NLRB 313, 314-15 (1960). In the circumstances of this case, it is clear that the Respondent has not met its burden of proving that the reduction in its ranks was permanent.

Putting aside the question of whether or not Seefeldt and Jacobs met the Act's criteria for supervisors, the record establishes that the Respondent's workforce was always composed of more than one non-supervisory carpenter prior to September, each of whom belonged to the Carpenters Union. Indeed, so far

[27]Kehl, a fourth member of the Carpenters' Union, is an admitted supervisor.

as the records reveal, the only time that Respondent's workforce fell to a single carpenter was during this brief and volatile period in September.[28] Thus, in 1980, the Respondent had a stable workforce which averaged 10 carpenters, excluding the alleged supervisors. In 1981, this number gradually dwindled from a high of nine in January to a low in August of three--Hudson, Time and Moore.[29] Prior to the layoffs of Hudson and Timm, the record evidence establishes that these three had been in Respondent's employ on a steady basis since at least 1978. However, the Respondent insists that its employees were terminated, not laid off, so that when Timm and Hudson were dismissed with no expectation of recall, only one non-supervisory employee, Moore, remained. The evidence shows that this low-water mark was of short duration. By the latter part of September and early October, at least two new workmen had been hired who were performing carpenters' duties. It is irrelevant that these two had not been employed previously by the Respondent since the Board does not insist that the existence of a unit depends upon the employment of particular employees, but rather than on their classification. *See, National Dairy Products Corporation, supra*, at 315, n.5. Over the next several months, even more employees were added, at least one of whom, Timm, was a member of the Carpenters.

Contrary to Respondent's contention, most of its employees could expect to be rehired. Thus, as a practical matter, employees generally were laid off, not permanently dismissed. It is true that on cross-examination, employee Hudson testified that he felt free to look for other work when a job was completed and no

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[28]The General Counsel does not contend nor does the evidence establish that the termination of any employee prior to September 1981 was for discriminatory reasons.

[29]To be precise, the record shows that Hudson was dismissed on September 2, 1981, just one day before Respondent claimed that the Carpenters Union did not have majority support.

further work remained for him. But job hunting in such circumstances is not incompatible with a layoff status. More significantly, he also testified that when he was ready to return to work for Respondent, he simply indicated his availability and was readily rehired. Other carpenters, Watson and Timm for example, also had brief periods of interrupted employment, but like Hudson, were rehired by the Respondent within a short period of time after their layoffs. Respondent insisted that it was keenly interested in maintaining a stable and skilled workforce. It could hardly accomplish this end if it permanently terminated employees whenever work grew slack.

If any further evidence was needed to convince the skeptical that Respondent's carpenter crew was comprised of more than one employee, it would lie in the number of persons whom Respondent claimed were supervisors. It defies credulity to believe that Garman would have three superintendents on its payroll (Kehl, Jacobs and Seefeldt), supervising the work of a single carpenter. Moreover, Nampel, who exercised principal authority over field operations, also regularly toured the jobsites, adding still another level of supervision.

For the foregoing reasons, I find no merit to Respondent's claim that it experienced a permanent depletion of its carpenter crew.[30] If Respondent's position was accepted, it would mean that employers could terminate their collective-bargaining relationships at will merely by briefly laying off entire bargaining units. The public's interest in stability and peace in labor relations prohibits such a possibility. Accordingly, the Respondent had no legal basis to challenge the Carpenters' majority and was under a continuing duty to recognize and bargain with the Local as the lawful collective-bargaining agent of its employees in an appropriate unit.

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[30]In view of the above findings, it is unnecessary to reach the question of whether Seefeldt who is now deceased, and Jacobs were supervisors within the meaning of Section 2(2) of the Act.

2(c) Stability of the Workforce

Having concluded that both the Laborers and Carpenters enjoyed majority support among Respondent's employees in appropriate craft units, I next turn to the question of whether Respondent employed a permanent workforce. If it did, then Respondent's *de facto* contracts with these Unions are mature collective-bargaining agreements within the meaning of Section 9(a) of the Act, thereby making it unnecessary to determine whether the Unions' majorities must be demonstrated from one jobsite to another.

An examination of numerous documents entered into evidence in this case, including employee timecards and contributions forms to the, fringe benefit and working dues assessment funds, establishes that there was a high degree of continuity in Garman's employee complement. From at least 1978 to August 1981, the Respondent's business records demonstrate that Garman employed a core group of workers. Admittedly, the total number of employees fluctuated from time to time depending on the amount of work on hand. However, the identity of those who were retained seldom varied. Moreover, as noted previously, when new jobs were obtained, members of the core who were laid off, generally were among the first to be recalled. Thus, the records show that between September 1980 and August 1981, 13 Carpenters were employed by the Respondent. Of these 13, 9 worked 7 or more months during the 12-month period. In the next year, the corp group of non-supervisory employees decreased from a high of nine in January to three in August. These three, as well as two other Carpenter alleged supervisors, worked for Respondent since at least 1978. Further, Respondent moved its employees from job to job; it did not hire new employees for each new project and terminate them when that job was completed.

As noted elsewhere in this Decision, the Respondent conceded that it was interested in retaining a stable workforce. The record clearly demonstrates that it succeeded in doing so.

Only after proclaiming that it had no duty to bargain with the Unions in September 1981, did Respondent hire a number of new workers who belonged to no union. Prior to that date, however, from at least 1978 through August 1981, employee turnover was relatively slight. Accordingly, I find that Respondent employed a permanent and stable workforce at all relevant times prior to September 1981 and that the Carpenters and Laborers had virtually unanimous support among the employees performing tasks within their respective crafts. Therefore, the *de facto* agreements between the Respondent and the Unions which expired in 1981 were not prehire agreements under Section 8(f), but rather, were ripe, collective-bargaining agreements within the meaning of Section 9(a) of the Act. *See, Construction Erectors, Inc.*, 265 NLRB No. 95 (1982); *Precision Striping, Inc.*, 245 NLRB 169 (1979).

3. The Impasse Issue

The final issue to be considered in this case concerns the allegation that the Respondent refused to bargain with the Unions in violation of Section 8(a)(5) of the Act. The General Counsel asserts that the few meetings between the Respondent and the Unions did not constitute bargaining sessions but rather were preliminary meetings at which the parties engaged in exploratory discussions. In support of this assertion, the General Counsel points to the fact that only three relatively brief meetings were held and to the fact that no written proposals were exchanged. He further submits that if these meetings are treated as negotiations, then the Respondent's bad faith precludes finding that an impasse occurred. Respondent counters that it voluntarily and in good faith engaged in collective-bargaining with the Laborers and Carpenters by participating in three bargaining sessions in the summer of 1981 and another in the fall of 1982. Respondent claims that impasse was reached at the third meeting when the Carpenters walked out in the belief that it had no written contract with Garman. Similarly, Respondent argues that impasse was reached with the Laborers when business agent

Planthaber insisted that he could not offer terms or conditions which varied from those in the master agreement.

The record as to the exchanges among the parties at the three meetings in early June and July of 1981 and at a fourth meeting on November 2, 1982, leaves much to be desired. Because the witnesses' descriptions of what transpired were hazy and confused, it is difficult to determine precisely what transpired. However, a careful review of the record persuades me that the Respondent did not approach these meetings with an open mind or with the intent to reach agreement. Neither did the meetings conclude with hard lines drawn and positions carved in stone.

The First Meeting

The first meeting came about after Seefeldt advised Carpenter business agent Hayen in early June of Respondent's stated intent to hire non-union employees. A week or so later, Hayen met with Johnson in his office.[31] When Johnson described the Company's financial woes, Hayen mentioned the possibility of several different types of contracts including residential and maintenance agreements. Johnson indicated that a residential agreement was inappropriate for the work being done by his firm but asked for further information about maintenance contracts.[32] Hayen stated that he would contact representatives for the Carpenters International and District Council to see if something could be worked out in Respondent's interest.

According to Johnson, Hayen told him that he could not go forward with negotiations alone but would have to work coopera-

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[31]Nampel testified that he was present at this initial meeting, but both Johnson and Hayen agreed that they met alone.

[32]No witness satisfactorily explained what a maintenance contract is. As best I can discern, it covers carpentry work which is necessary for the maintenance of industrial equipment or factories.

tively with the Laborers and promised to get back to him. Hayen acknowledged telling Johnson that he would have to look into the question of different types of contracts by contacting others in his Union. As he explained at the hearing, he was powerless to engage in independent negotiations which would bind the Carpenters for the Union proceeds by team bargaining. However, Hayen denied stating that he would have to coordinate the Carpenters' efforts with the Laborers business agent, Planthaber. It may be that Respondent suggested to Hayen that Planthaber be involved in future meetings since it would have been in Garman's interest to insist on inclusion of the same terms in contracts with each Union. But it is most unlikely that Hayen would suggest that any contractual undertaking of the Carpenters was dependent upon the Laborers' acquiescence. Each Local was, of course, an independent organization having different terms and conditions of employment in separate contracts applicable to their respective bargaining units.[33] Given these considerations, I find it far more likely that Hayen simply raised the necessity of involving other Carpenter functionaries but did not make any future agreement contingent on the presence of the Laborers.

The Second Meeting

Hayen arranged another meeting with Johnson a week later at which Collier and Planthaber were present. All three union agents maintained that the meeting was called to resolve a jurisdictional dispute involving a carpenter, Jacobs, who Collier had observed performing unit work that came under the Labor-

[33]Its interesting to note that a Carpenter official did not require the presence of a representative from the Laborers in a meeting with Johnson in November 1982.

ers' domain. This dispute was resolved with Johnson agreeing to employ a laborer rather than Jacobs to perform the job.[34]

Planthaber confirmed that he came to the meeting with the understanding that it was to resolve a jurisdictional dispute. Only toward the end of the session, did Johnson allude to the firms's financial plight. Other than this, Planthaber does not remember having engaged in negotiations.

Johnson testified to the contrary, that Hayen asked Planthaber if the Laborers would give the Respondent a lower wage rate than the one set in the master contract and that Planthaber's response was negative. Hayen denied having asked such a question noting that what the Laborers might be willing to do was out of his bailiwick. Planthaber had no recollection whatsoever of being asked whether he would acquiesce to a contract for Garman which differed from those applying to other employers. However, he acknowledged at the instant proceeding that if he been asked such a question, he would not have agreed to a wage rate that varied from one employer to the next. Planthaber's candor in this regard leads me to believe that he did not make the comment which Johnson attributed to him. If he had no hesitation in expressing his view on the matter at the hearing before me, I find no reason why he would deny having made the same remark to Johnson. However, even if Planthaber had made his position known to Johnson at their meeting, it would have little effect on continuing negotiations, since he had no authority

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[34]Respondent maintains that the parties did not discuss a jurisdictional dispute involving Jacobs at this meeting. To support its contention, Respondent alleges that Jacobs denied having any encounter with Collier. In fact, the record discloses that Jacobs simply testified that he did not recall having seen a Laborers' business agent on a jobsite in recent times. No question was posed to him which might have tested his recollection about a specific incident involving his performance of laborers' work. The mutually corroborative accounts of this meeting provided by Hayen, Collier and Planthaber convince me that their version is correct.

to bind the Laborers to a collective-bargaining agreement through his individually-expressed view. Accordingly, I credit Planthaber's assertion that he was not asked and did not respond to a question regarding the Laborers' position on variations from the master agreement. As this meeting ended, Hayen assured Johnson again that he would try to work something out and get back to him.

The Third Meeting

In late June or early July, Johnson and Nampel met with Hayen who was accompanied by representatives from the Carpenters' International, and District Council.[35] Once again, Johnson complained of the Company's difficulties in competing with non-union firms. A discussion ensued about the applicability of maintenance contracts and the possibility of obtaining federal funds.

Johnson and Nampel testified that at one point, International Representative Jahnke asked Hayen whether the Carpenters had a signed contract with the Respondent. When Hayen answered that they did not, Respondent's witnesses claim that Jahnke stated abruptly that there was no sense in pursuing the situation further and left. Jahnke and Hayen deny that any such exchange occurred. Logic compels me to conclude that Jahnke and Hayen should be credited in this matter. Hayen knew in advance that the Carpenters had no written contract with the Respondent and surely would have advised Jahnke of that prior to the meeting. Further, the fact that Respondent had no contract would in no way bar negotiations between the parties. In fact, the absence of a written executed contract is the very reason why the Carpenters were meeting with Respondent's principals in the first place. The parties parted company amicably after an hour, with Nampel

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[35]District Council Member Valesquez' recollection of this meeting was so contradictory to that of every other participant, that I am convinced he confused Garman with some other company. Therefore, I do not rely on his testimony as to what occurred at this meeting.

uttering these final words to Hayen: "Keep working on something. See if you can do something for us." It is improbable that Nampel would make such entreaties if Jahnke had just ruled out the possibility of further discussions.

A Fourth Meeting

A month or two after this third meeting, the Respondent filed its representation petitions with the Board. The parties made no further effort to meet until shortly before this hearing commenced when by letters dated October 21, 1982, to the Laborers and Carpenters, the Respondent proposed to meet and negotiate collective-bargaining agreements. Subsequently, Carpenters representative Frey and Johnson met on November 2, 1982. Johnson then took the position that he could not afford to pay his employees more than they currently were receiving.[36] Frey suggested that if Respondent signed the current Carpenters' agreement for the balance of its term, a period of 7 months, the Union would forego a demand for back wages owed and past contributions to the fringe benefit funds and also would withdraw the charges in this proceeding.[37] Johnson made no counter offer. Instead, he ended this exchange by stating, "I think we have agreed to disagree." Johnson also raised the matter of assigning employees to work across craft lines. Frey took a

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[36]General Counsel's Exhibit 12 reveals that Respondent had hired a number of new employees bringing the total to 18 as of September 1982. Of these, 5 persons who formerly belonged to the Carpenters' Union and 6 to the Laborers' Local continued to receive wages close to the union scales which prevailed in June 1981. Most others received wages well below contractual rates.

[37]At the hearing, I sustained General Counsel's objection to the admission of evidence concerning the Carpenters' offer to withdraw its charge on the theory that Federal Rule of Evidence 408 proscribes the admissibility of evidence concerning efforts to compromise a claim. I reverse this ruling, sua sponte, since on further consideration, I am convinced that the rule does not exclude evidence "offered for another purpose." Here, Frey's testimony was adduced to reveal the parties' positions in a negotiating session, and not to show liability on a claim.

moderate position on this issue assuring Johnson that there would be no problems if Carpenters did some Laborers' work and vice versa. Johnson also stated that he could not compel his workers to join the Union which would be required by the union security clause in the contract. No other terms were discussed and neither party presented any formal written proposals. The meeting concluded with Frey indicating that he would be willing to engage in further negotiations with the Respondent.

Analysis

The term "bargain collectively" is defined in Section 8(d) of the Act as requiring a mutual obligation by an employer and the representative of the employees "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." Where an employer is obligated to bargain, impasse must occur before any unilateral changes in the terms of employment may be made. *Wayne's Olive Mills Farms, Inc., d/b/a Wayne's Dairy*, 223 NLRB 260, 264 (1976). An employer or employee representative may be released from bargaining obligations only if the impasse occurs at a time when the parties have irreconcilable differences reached after exhaustive good faith negotiations. *See, Carpenter Sprinkler Corporation*, 238 NLRB 974, 982 (1978); *aff'd and modified in part*, 605 F.2d 60 (2nd Cir. 1979).

In *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475 (1967), the Board suggested that the following criteria be used to determine whether a bargaining impasse exists:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of

> the parties as to the state of negotiations are all relevant factors to be considered. . . .

On applying these factors to the case at bar, I find, in agreement with the General Counsel, that no impasse occurred.

Whether the Respondent or the Union met with a sincere willingness to enter into negotiations looking toward the consummation of an agreement or merely engaged in surface bargaining, giving only an appearance of complying with its statutory obligation, is a difficult issue at best and involves plumbing the subjective states of mind of the parties. In attempting to define the illusive concept of good faith, the Board stated in *M System, Inc., Mobile Home Division Mid States Corporation*, 129 NLRB 527, 547 (1960):

> Good faith or the want of it, is concerned essentially with a state of mind. . . . That determination must be based upon reasonable inference from the totality of conduct evidencing the state of mind with which the employer entered into and participated in the bargaining process. The employer's state of mind is to be gleaned not only from his conduct at the bargaining table but also from his conduct away from it--for example, conduct reflecting a rejection of the principal of collective-bargaining or an underlying purpose to bypass or undermine the union manifests the absence of a genuine desire to compose differences and to reach agreement in the manner the Act commands. All aspects of the Respondent's bargaining and related conduct must be considered in unity not as separate fragments each to be assessed in isolation.

Further guidance in detecting the subtle manifestations of bad faith was provided early in *N.L.R.B. v. Reed and Prince Mfg. Co.*, 205 F.2d 131, 134, 135 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953):

> If the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations. . . . Thus, if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the Union at least part way, then certainly the Board may be able to conclude that this is at least some evidence of bad faith.
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> . . .

Assessing the evidence in light of the foregoing principles, I conclude, based on the totality of the Respondent's conduct both at and away from the bargaining table, that its officers did not bargain in good faith.

It is apparent that by mid-June 1981, the Respondent had decided to go non-union. Consequently, it could have no serious interest in meaningful bargaining with its employees' representatives. Proof of its decision is found in Johnson's comments to employees that he was going non-union or thinking about it and inquiring whether they would work with non-union workers. Although the dates on which such remarks were delivered cannot be fixed with precision, it may be safely inferred that they came on or about the same time as the initial bargaining meeting in early June and continued throughout the period of time in which the next two meetings took place. The record also shows that the Respondent failed to give a wage increase to its employees in June in conformance with the collective-bargaining agreements, although in past years wage increases paralleling those in the contracts were implemented routinely. The foregoing evidence provides convincing proof that at the same time that the Carpenters' representatives were discussing whether or not economic relief could be provided, the Respondent had decided that the only way it could compete was to become a non-union contractor. Consequently, Respondent went through the motions of meeting with the employees' representatives all the while holding a

preformed intent inconsistent with good faith collective bargaining. Where, as here, an employer engages in a course of conduct designed to jettison the employees' support for their collective-bargaining agent at the very time negotiations are taking place, claims of good faith will not be countenanced. *See, M System Inc., supra*, at 549; *Imperial Machine Corp.*, 121 NLRB 621 (1958).

Still another indicator of Respondent's resistance to meaningful bargaining lies in its failure to offer counterproposals to the Unions. While it is true that neither party is required to make concessions, a willingness to compromise is often regarded as an essential ingredient of good faith bargaining. *See, N.L.R.B. v. Reed and Prince Mfg. Co., supra*, at 134. At no time did Respondent offer a single concession or suggest reasonable alternatives to the Unions' propositions.

Johnson's resistance to reaching agreement was more obvious at his fourth meeting with the Carpenters than at the previous three. While it is clear that Frey felt wedded to the master contract, he did display considerable flexibility by offering significant concessions. Thus, he suggested that the Carpenters would waive any duty to pay backpay and fringe benefits for the past 2 years and drop the charges in the case at bar if the Respondent would accept the master contract for just 7 more months. Although the Respondent had no duty to yield to this proposal, Johnson's instant rejection reveals a wholly-closed mind. Surely Frey's proposition had to signal to Johnson, as it does to me, that the Union was ready to engage in the give and take of genuine bargaining. Frey's willingness to compromise also was manifested by his agreeing that employees could work across craft lines to some extent. Clearly, given Frey's conciliatory position, no impasse was reached on this issue. Again, Johnson offered not a single counterproposal. Rather, he continued to insist, as he had throughout the previous three meetings, that the Respondent did not have the economic wherewithal to comply with the Unions' demands. Even assuming that the Respondent experienced the same financial difficulties in November 1982 as it did in the summer of 1981, its failure to move from its initial

economic proposals in the face of some Union movement provides further proof of surface bargaining. *See, Neon Sign Corporation*, 229 NLRB No. 125 (1977). As a matter of fact, by the time of the fourth meeting, Respondent's business affairs apparently had taken a turn for the better, as evidenced by the number of new employees it had added to its payroll and the pay raises granted to them. It is noteworthy, that although the Respondent continued to claim fiscal hardship, it made no effort during bargaining, or at this hearing, to establish that the Company was unable to afford any part of the Unions' wage package. *See, Orion Tool and Die Machine Co.*, 195 NLRB 1080, 1088 (1972). Johnson's conduct at this meeting is not characteristic of a negotiator with an open mind and a genuine interest in finding common ground. Rather, his apparently orchestrated statement that he and Frey have "agreed to disagree" discloses that he came to the bargaining table "with a predetermined resolve not to budge from an initial position." *N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 154-155 (1956). Respondent's conduct during this fourth meeting leads me to conclude that Johnson was engaged in a meaningless charade simply to make a record for this litigation.

Even apart from the issue of good or bad faith, I am not persuaded that the first few meetings between the parties qualify as collective-bargaining negotiations. The parties met only three times. The Laborers were involved in only one of these meetings. Thus, even according to the Respondent's best estimates, the meetings with the Carpenters consumed approximately 4 hours and with the Laborers, a maximum of an hour and one-half. This is hardly sufficient time to have exhausted the possibilities for meaningful exchange.

The first meeting was exploratory in nature, with Hayen listening to the Company's plight and then suggesting various contract options which might be available. There was no serious consideration of any given contract. The second meeting was the only one which involved the Laborers but it can hardly be characterized as a bargaining session since its principal purpose

was to dispose of the jurisdictional dispute. I also found above that Planthaber did not insist on adherence to a master contract but even if he had, one such statement does not put an end to further discussion. Impasse is not reached with a single offer and rejection of proposal. *See, Inter-Roto Inc.*, 252 NLRB 764, 768 (1980).

Respondent's next meeting with a few representatives of the Carpenters Union was almost as inconclusive as the first between Johnson and Hayen alone. The discussion was generalized; no written proposals were presented by either side. While it is clear that the Respondent was principally concerned about the wage issue and sought some way to reduce its costs, it did not identify any part of the Union contract which was more or less acceptable. Thus it is fair to say with respect to all three meetings that there was "no continuous give and take in the form of negotiating over specific proposals." *See, Carpenter Sprinkling Corp., supra*, 605 F.2d at 65. Moreover, Nampel's final request to the Carpenters' representatives that they "keep working on something," makes it is clear that further meetings were anticipated. Based on this record of brief and inconclusive meetings, it is fair to state that the parties had neither "exhausted bargaining possibilities nor reached the stage where further meetings would have been fruitless." *N.L.R.B. v. Dell Jr., Trading as Way Cross Machine Shop*, 283 F.2d 733, 740 (5th Cir. 1960).

The Respondent blames the purported impasse on the Union's obstinacy in clinging to their master agreements. However, having found that the Respondent approached collective-bargaining negotiations with a preconceived determination to rid itself of any obligation to engage in collective bargaining, and that it bargained in bad faith from the outset, it is not possible to determine whether the Unions bargained in good or bad faith nor to conclude that the parties bargained to impasse. *See, United Mine Workers of America, Local 1854*, 238 NLRB 1583, 1632, n.93 (1978). Although the Unions apparently felt constrained by their area agreements, I do not find that either the Carpenters or the Laborers refused to continue to negotiate or

lacked a sincere desire to reach agreement. Given their few meetings, and Respondent's bad faith bargaining, it is difficult to predict whether they would have compromised eventually on at least some of the terms and conditions contained in their master contracts.

I also find no merit in the Respondent's contention that the Unions' waived their right to bargain or to protest its unilateral changes in the workers' terms and conditions of employment. The Board and the courts repeatedly have affirmed that a waiver of bargaining rights by a union will not be lightly inferred. This is particularly true, where, as here, the Union filed charges with the Board shortly after the Respondent repudiated its bargaining relationship and instituted unilateral changes. Thus, it cannot be said that the Laborers or Carpenters waived any rights by acquiescence or a failure to act. *See, Allan W. Bird II, Receiver for Caravelle Boat Company*, 227 NLRB 1355, 1358 (1977).[38]

Assuming arguendo, the parties had deadlocked, Respondent would not have been entitled to withdraw recognition from the

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[38]By date of February 25, 1983, Respondent filed a *Motion for Leave to Reopen the Record for the Limited Purpose of Receiving the Affidavit of Garman Construction Company Regarding Post-hearing Bargaining* which was opposed by the General Counsel and the Operating Engineers. In effect, Respondent seeks to introduce evidence based on an affidavit signed by Johnson as to alleged negotiating sessions conducted subsequent to the hearing in this case. Respondent contends that this affidavit would demonstrate the Company and the Union bargained to impasse. I deny Respondent's motion for the following reasons: First, Respondent's post-hearing conduct cannot make moot questions regarding its alleged violations of Section 8(a)(5). *See The Massillion Publishing Company*, 215 NLRB 380 (1974). Such post-hearing attempts to remedy an alleged violation of the Act are of minimal relevance in determining whether the violation in fact occurred. *See, J.P. Stevens and Company, Inc.*, 247 NLRB 420, 493 and 110 (1980). Second, it would be improper to admit into evidence a self serving document which was not subject to cross-examination. Lastly, to whatever extent such evidence may affect Respondent's liability, it is more appropriately introduced at the compliance stage of these proceedings.

Unions. But clearly, no impasse existed here. Thus, Respondent was not entitled to make unilateral changes affecting the terms and conditions of the workers' employment. *See, N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962). There can be little doubt that the Respondent did in fact make such changes. Thus the record shows that it failed to give pay increases to its employees as called for by their collective-bargaining agreements in June 1981 and after September 1, 1981, discontinued contributions to the employees' fringe benefit funds, hired nonunion employees and assigned personnel to tasks without regard to craft jurisdictional lines. By withdrawing recognition from the Unions and thereafter refusing to bargain about its unilateral changes much less a renewal of its contracts, Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Garman Construction Company is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

2. The United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 790 and the Building and Common Laborers Union, Local No. 727 of Laborers International Union of North America, AFL-CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. The Carpenters Union is the exclusive representative of employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All employees performing Carpenter craft work employed by Garman Construction company within the geographical jurisdiction of Carpenters Local Union No. 790.

4. The Laborers Union is the exclusive bargaining representative of employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All employees employed by Garman Construction Company at any of its jobsites or facilities who perform work in the laborers' trade.

6. By interrogating employees about their membership in or support of the Unions, by giving employees the impression that their reemployment was conditioned upon withdrawing from union membership; by implying to employees that their job status was conditioned on withdrawing their union membership; by sponsoring and assisting in the preparation and circulation of petitions to decertify Carpenters' Local 719; and by promising employees improved benefits such as insurance and health plans, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. By negotiating in bad faith with no intention to arrive at an agreement, by unilaterally discontinuing giving wage increases in accordance with the Union contracts; by ceasing contributions to the employees' fringe benefit funds; by hiring nonunion employees, and by assigning work without respect to craft jurisdictional lines, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

8. The unfair labor practices set forth in paragraphs 6 and 7 above, effect commerce within the meaning of the Act.

9. The Respondent has not violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain collectively with Local Union No. 150, International Union of Operating Engineers, AFL-CIO as that labor organization does not represent a majority of the Respondent's employees in an appropriate unit.

10. The General Counsel has failed to establish that the Respondent violated Section 8(a)(1) of the Act by engaging in the conduct described in paragraphs 10 (f), (g), and (i) of the complaint.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the polices of the Act. As found above, Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Carpenters Local 790 and Laborers Local 727 as the collective bargaining representative of its employees. As a remedy, I shall direct the Respondent to recognize and bargain in good faith, upon request, with these Unions. I also find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its employees' terms and conditions of employment. Accordingly, Respondent shall be ordered (a) to revoke, upon the Union's request, any unilateral changes implemented after September 3, 1981, unless the Unions request that a particular change not be rescinded and (b) reinstate and give retroactive effect to the terms and conditions of the Carpenters and Laborers agreements with the Northern Illinois Building Contractors Association which expired on May 31, 1981, until such time as the Respondent reaches agreement or bargains in good faith to impasse with the Unions. If agreements are reached, they shall be embodied in signed contracts.

In addition, Respondent shall be ordered to make whole the employees in the units found appropriate above, and to all employees hired after September 3, 1981, for any loss of wages or other benefits which they may have sustained as a result of Respondents unilateral changes, including losses incurred by its assignment of work outside the employees' crafts in accordance with wage scales in the expired collective-bargaining agreements. Such backpay shall be computed with interest as described in *Isis*

Plumbing & Heating Co., 138 NLRB 716 and *Florida Steel Corporation*, 231 NLRB 651. Moreover, Respondent shall be required to pay into the various Carpenters' and Laborers' fringe benefit funds as designated in their expired contracts, contributions it has failed to make since September 1981 on behalf of all employees on its payrolls since that date, whether or not they were Union members. *See, Remodeling By Oltmanns, Inc., supra*, (ALJD at 22); *Creative Engineering*, 228 NLRB 682 (1977). The question of interest on sums owed to the Unions' trust funds will be left to the compliance stage of this proceeding. *See, Remodeling By Oltmanns, Inc., supra* (ALJD at 22).

Further, the serious and pervasive unfair labor practices committed by the Respondent strike at the heart of employees' rights safeguarded by the Act. Therefore, I shall recommend a broad cease and desist order which restrains Respondent from in any manner infringing upon those rights which are guaranteed by Section 7.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[39]

Respondent Garman Construction Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[39]In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Refusing to recognize and bargain collectively with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 790 as the representative of its employees in the appropriate unit described as follows:

> All employees performing carpenter craft work employed by Garman Construction Company within the geographical jurisdiction of Carpenters Local Union No. 790.

(b) Refusing to recognize and bargain collectively with Building and Common Laborers Unions, Local No. 727 of Laborers International Union of North America, AFL-CIO, as the representative of its employees in the appropriate unit described as follows:

> All employees employed by Garman Construction Company at any of its jobsites or facilities who perform work in the laborers trade.

(c) Refusing to reinstate the terms and conditions of employment set forth in the 1978-1981 collective-bargaining agreements entered into between Northern Illinois Building Contractors Association, Inc., and Northwestern Illinois District Council of Carpenters and with the Laborers' International Unions and certain Laborers' local unions including Local 727 with respect to employees in the appropriate units described above in subparagraphs 1(a) and (b) except in such circumstances where the Carpenters or Laborers' locals request that a particular unilateral change not be revoked.

(d) Unilaterally changing wages, Union trust fund and other contractually based payments, work assignments by craft or other working conditions without bargaining in good faith to impasse or to agreement with Carpenters' Local 790 and Laborers Local 727 as the collective bargaining representatives of the employees in the appropriate unit described above in subparagraphs (a) and (b) respectively.

(e) Failing and refusing to make contractually based payments on behalf of its employees in the units described in paragraphs (a) and (b) since September 1981 to the various Carpenters' and Laborers' fringe benefit funds, including the Carpenters' health and welfare, pension, apprenticeship, vacation and working assessment funds and the Laborers' pension and welfare, dental, training, vacation savings and working dues funds.

(f) Restraining, coercing or interfering with its employees' Section 7 rights by interrogating employees about their membership in or support of the Unions; by asking if they would work with non-union employees; by creating the impression that employees' recall to work is conditioned upon their withdrawing from union membership, by implying to employees that they will lose their jobs if they do not withdraw from union membership; by initiating, and assisting employees in the circulation of petitions to decertify any labor organization; by promising employees improved insurance or other benefits if they withdraw their membership in and support of union organizations.

(f) In any other manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act:

(a) Recognize and upon request bargain with Laborers' Local 727 and Carpenters' Local 790 as the exclusive representatives of the employees in the appropriate units described above in paragraphs 1(a) and (b) respectively, and if understandings are reached, embody such understandings in signed collective-bargaining agreements.

(b) Upon request of Laborers Local 727 and Carpenters Local 790 reinstate the terms and conditions of their 1978-1981 collective-bargaining agreements which were in effect as of June 1, 1981 as to employees in appropriate units represented by each

of those Locals, except in circumstances where either Union requests that particular unilateral changes not be revoked.

(c) Pay into the various Carpenters and Laborers trust funds, (including working assessments) the contributions and payments it has failed to make since September 1981 with respect to all employees employed by the Respondent since September 1981 who were performing work within the Carpenters' and/or Laborers' jurisdictional lines, whether or not they were members of those Unions.

(d) Make whole with interest, employees who have suffered monetary losses by reason of Respondent's repudiation of its contracts with Laborers Local 727 and Carpenters Local 790, including wages which may have been lost by Respondent's failure to assign work in accordance with craft jurisdictional lines.

(e) Preserve and upon request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and other monies due under the terms of this Order.

(f) Post at its office in Freeport, Illinois, at all its present jobsites, and mail to all employees employed at any time since June 1, 1981, copies of the attached notice marked "Appendix."[40] with the proof of service to be submitted to the Regional Director for Region 33. Copies of said notice on forms provided by the Regional Director for Region 33, after being duly signed by Respondent's authorized representative, shall be posted by

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[40]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 33, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS RECOMMENDED that the allegations of the complaint which were found not to have been sustained by the evidence or unsupported by precedent be dismissed.

Dated, Washington, D.C. September 29, 1983

Signed
Arline Pacht
Administrative Law Judge

APPENDIX JD-430-83

NOTICE TO EMPLOYEES

[SEAL] [SEAL]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH ALL PARTIES HAD AN OPPORTUNITY TO PRESENT EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED THAT WE POST THIS NOTICE. WE HEREBY PROMISE THAT:

WE WILL NOT refuse to recognize and bargain collectively in good faith upon request, concerning rates of pay, wages, hours and other terms and conditions of employment with CARPENTERS LOCAL NO. 790 as the exclusive bargaining representative of employees in the following appropriate unit: All employees performing carpenter craft worked employed by Garman Construction Company within the geographical jurisdiction of Carpenters Local Union No. 790.

WE WILL NOT refuse to recognize and bargain collectively in good faith as to rates of pay, wages, hours and other terms and conditions of employment with LABORERS LOCAL UNION NO. 727 of the LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, as the exclusive bargaining representative of our employees in the following appropriate unit: All employees employed by Garman Construction Company at any of its jobsites or facilities who perform work in the laborers' trade.

WE WILL NOT refuse to reinstate and give full force and effect to the terms and conditions of employment set forth in the collective-bargaining agreements which expired May 31, 1981, entered into between NORTHERN ILLINOIS BUILDING CONTRACTORS ASSOCIATIONS, INC., and NORTHWESTERN ILLINOIS DISTRICT COUNCIL OF CARPENTERS and the LABORERS INTERNATIONAL UNION and certain Laborers local unions, including Local 727, with respect to our employees in the above-described Carpenters' and Laborers' units, except in such circumstances where Local 790 or Local 727 requests that particular unilateral changes affecting employees in units which they represent not be revoked, until such time as an agreement or impasse is reached.

WE WILL NOT unilaterally change wages, union trust fund and other contractually based payments, work assignments by craft or other working conditions without bargaining in good faith with Carpenters Local 790 and with Laborers Local 727 as the collective-bargaining representatives of employees in the appropriate units described above.

WE WILL NOT fail or refuse to make contributions and contractually based payments on behalf of our employees in the above-described appropriate Carpenters' unit which were due since September 1981 to the various Carpenters' funds, including the health and welfare, pension, apprenticeship, vacation and working dues assessment funds.

WE WILL NOT fail nor refuse to make contributions and contractually based payments on behalf of our employees in the above-described appropriate Laborer's unit which were due since September 1981 to the various Laborers' trust funds, including the pension and

welfare, dental, training, vacation saving and working dues assessment funds.

WE WILL NOT interrogate our employees about their membership in or support of labor organizations or ask employees if they would work with nonunion employees or what they think about going nonunion.

WE WILL NOT give employees the impression that their recall to work is conditioned on withdrawing from membership in or support of any union.

WE WILL NOT imply to employees that their jobs are dependent on their withdrawal from union membership.

WE WILL NOT initiate or assist employees in the preparation or circulation of any petition, nor sponsor any movement to decertify Carpenters Local 790, or any other labor organization.

WE WILL NOT promise employees improved insurance benefits or other benefits if they withdraw from membership in or support of any union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and upon request bargain in good faith with LABORERS LOCAL 727 and CARPENTERS LOCAL 790 as the exclusive representatives of employees in the appropriate Carpenters and Laborers units described above, and if understandings are reached, will embody such understanding in signed contracts.

WE WILL, upon request of LABORERS LOCAL 727, or CARPENTERS LOCAL 790, reinstate the terms

and conditions of their expired collective-bargaining agreements which were in effect prior to June 1, 1981 as to employees in the appropriate Laborers and Carpenters' units as described above until such time as a new agreement or impasse is reached unless either Local requests that particular unilateral changes not be revoked.

WE WILL pay into the various Carpenters' and Laborers' trust funds, including working assessments to the Carpenters and working dues to the Laborers, the contributions and payments we have failed to make since September 1981 with respect to all employees who were working or should have been working within their respective craft jurisdictions if we had followed past practice and/or contractually established procedures.

WE WILL revoke and cease giving effect to unilateral changes with respect to lower wage rates; cessation of payments to the union fringe benefit funds; failure to adhere to the contractual union security clauses and to follow jurisdictional lines in assigning work unless Laborers' Local 727 and Carpenters Local 790 request that a particular change not be revoked.

WE WILL make whole employees in the above-described units who were employed by us on or after June 1, 1981 whether or not they were members of the Carpenters or Laborers Unions for any loss of pay they may have suffered because of our repudiation of the collective-bargaining agreements with those Unions or because of our failure to apply to such employees the terms and conditions of employment which should have been in effect as of June 1, 1981, including losses sustained by our failing to follow craft jurisdictional lines in making work assignments and unilateral changes in wages. No part of this Order shall be construed as

requiring us to rescind any benefits heretofore granted to unit employees commencing June 1, 1981.

GARMAN CONSTRUCTION COMPANY

(Employer)

Dated _____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office. Savings Center Tower - 16th Floor, 411 Hamilton Boulevard, Peoria, IL 61602, Telephone No. 309-671-7068.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 1, 1988.

By the Court:

No. 88-1005

INTERNATIONAL UNION OF OPERATING ENGINEER, LOCAL 150, AFL-CIO, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Petition for Review of an Order of the National Labor Relations Board.

No. 88-1100

GARMAN CONSTRUCTION COMPANY, Petitioner, vs. NATIONAL LABOR RELATIONS BOARD, Respondent.	)	Petition for Review of an Order of the National Labor Relations Board.

This matter comes before the court for its consideration of the "JOINT STIPULATION TO DISMISS" filed herein on March 31, 1988.

On consideration thereof,

IT IS ORDERED that these appeals are DISMISSED with prejudice and without costs pursuant to Federal Rule of Appellate Procedure 42(b).